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Supreme Court, U.S.
FILED

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In The
Supreme Court of the United States
October Term, 1996

DAVID M. JORDAN,

Petitioner,

v.

CARLOS VALDEZ, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY FOR NUECES AND KLEBERG COUNTIES; AND NUECES COUNTY AND KLEBERG COUNTY,

Respondents.

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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131 pp

QUESTIONS PRESENTED

David Jordan filed his Notice of Appeal from the United States District Court, Southern District of Texas, Corpus Christi Division, after the Court granted judgment for Kleberg County finding good cause existed not to restore Petitioner to his former position and granting judgment as to Nueces County finding that Nueces County was not the employer of Petitioner.

The Fifth Circuit Court of Appeals held that Kleberg County had the right to refuse reinstatement of David Jordan after returning from active military duty; that Respondent Nueces County was not the employer of David Jordan; but reversing the District Court in assessing costs against the Petitioner.

The questions presented here are:

Is a returning veteran under 38 U.S.C.A. § 4301 *et seq.* (VRRA) guaranteed a mandatory right of reinstatement based on Federal Law?

Did the Fifth Circuit err in concluding that the employee had fair notice that the conduct complained of would be grounds for discharge and did good cause exist to refuse to restore the Petitioner to his former position based on Federal Law?

Did the Fifth Circuit err in concluding that Nueces County was not the Petitioner's employer based on Federal Law and Texas Law?

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PETITION FOR WRIT OF CERTIORARI

David M. Jordan ("Jordan") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 8, 1996, in order to resolve the conflict between the Fifth Circuit and the Veteran's Reemployment Rights Act ("VRRA") on the important issues presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is unpublished. It is reprinted in Appendix "A" hereto ("App. A") at page A-1.

JURISDICTION

On May 10, 1995, the United States District Court for the Southern District of Texas, Corpus Christi Division granted final judgment for Defendant-Kleberg County on the grounds that the mandatory right of reinstatement contained in 38 U.S.C. § 4301(a)(B)(i)(VRRA) did not apply to Jordan as good cause existed for his termination. On June 6, 1995, Jordan filed a Notice of Appeal to the United States District Court for the Southern District, Corpus Christi Division.

The United States Court of Appeals for the Fifth Circuit affirmed, in an opinion filed on May 8, 1996, the District Court's ruling in regards to the VRRA violations and Nueces County not being an employer of Jordan but reversed as to taxable costs against a veteran in a VRRA

case. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

28 U.S.C. § 1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

38 U.S.C. § 2021 - 2026 provide:

§ 2021(a): (1) The returning veteran must have left an "other than temporary civilian position". A returning veteran must have left his or her job for the purpose of entering active duty.

(2) The veteran must have been released from active duty under honorable conditions. A person who was inducted (drafted) into the military must "receive a certificate described in section 9(a) of the Military Selective Service Act (relating to satisfactory completion of military service)".

(3) A Reserve Component member called to active duty voluntarily or involuntarily is entitled to reemployment "upon such person's relief from active duty under honorable conditions".

(4) The returning veteran must apply for reinstatement within 90 days after release from active duty.

(a) The application for reemployment need not be in writing, and no particular form of words is necessary. A general application is sufficient.

(b) The veteran is required to convey to his preservice employer that he is a former employee and that he is returning from military service and seeking reinstatement in employment.

§ 2021(a)(B)(i): (1) The returning veteran is entitled to the seniority, status, and pay that he or she would have enjoyed if continuously employed.

(2) The obligation to reemploy falls upon the returning veteran's pre-service employer or that employer's "successor in interest".

§ 2021(b)(1): The reemployed veteran shall not be discharged from such position within one year after such restoration or reemployment.

§ 2021(b)(2): [The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during [his military service].

(a) The escalator principal applies to "prerequisites of seniority", meaning promotions, pay raises, and other benefits which are dependent primarily upon seniority and which are intended to reward length of service and are not short-term compensation for services.

§ 2021(b)(3): A member of the National Guard or Reserve shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of his military obligations.

§§ 2024(a) and 2024(b): The period of active duty must not exceed four years.

(a) The four-year limit is a limit on the period of time the person spent on active duty, not how long he or she was away from work.

The four-year limit is cumulative so long as the person remains with the same employer. Only active duty, . . . counts toward the four-year limit.

§ 2024(d): (1) A Reserve Component member returning from drills or ACDUTRA is entitled to immediate reinstatement.

(2) Other returnees are entitled to reinstatement within a "reasonable time". How much time is "reasonable" depends upon the circumstances, but generally this should be measured in days, not weeks or months.

> (3) When the returnee who meets the eligibility criteria makes a timely application for reemployment, it is the employer's responsibility to ensure that he is promptly and properly reemployed.
>
> (4) The employer has no right to deny reinstatement simply because no opening exists.

38 U.S.C. § 4301 *et seq.* provides: Veterans have certain rights, and these rights are extended to reservists under 38 U.S.C. §§ 4301(b)(3) and 4304(b)(2). The VRRA is to be construed liberally in favor of reservists. The Act provides two separate protections to reservists:

> 38 U.S.C. § 4301(a)(2)(B) which provides that: In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act . . . and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such . . . service, and (1) receives [an honorable discharge] and (2) makes application for reemployment within ninety days after such person is relieved from such . . . service.
>
> > (B) if such position was in the employ of a State, or political subdivision thereof, . . . such person shall --
> >
> > > (i) if still qualified to perform the duties of such position . . . be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay;
> >
> > * * *
>
> unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

The reservist restored under this section of the statute "shall not be discharged from such position without cause within one year after such restoration."

38 U.S.C. § 4301(b)(3) provides:

> Any person who seeks or holds a position described in [4301(a)(2)(B)] shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

The protection found in § 4301(b)(3) continues for so long as the reservist is associated with a reserve unit of the Armed Forces.

38 U.S.C. § 4301(a)(B)(i) provides:

If such position was in the employ of a State, or political subdivision thereof, or a private employer, such person **shall**, if still qualified to perform the duties of such position or able to become requalified with reasonable efforts by the employer, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay.

38 U.S.C. § 4301(b)(1)(a) provides:

Any person who is restored to or employed in a position in accordance with the provisions in clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

38 U.S.C. § 4302 provides:

If any employer, who is a private employer of a State or political subdivision thereof, fails or refuses to comply with the provisions of [specified sections] of this title, the [appropriate] district court of the United States . . . shall have the power, upon filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits by reason of such employer's unlawful action . . .No fees or court costs shall be taxed against any person who may apply for such benefits.

38 U.S.C. § 4304(c) provides:

Any member of the Reserve component of the Armed Forces of the United States who is ordered to an initial period of active duty for training of not less than twelve consecutive weeks shall, upon application for reemployment within thirty-one days after (1) such member's release from such active duty for training after satisfactory service, . . . or one year after such member's scheduled release from such training, whichever is earlier be entitled to all reemployment rights and benefits provided by this chapter for persons inducted under the provisions of the Military Selective Service Act . . . except that (A) any person restored to or employed in a position in accordance with the provisions of this

subsection shall not be discharged from such position without cause within six months after that restoration.

STATEMENT OF THE CASE

The Plaintiff filed suit on February 4, 1994, in the United States District Court, Southern District of Texas, Corpus Christi Division, against Defendant, Grant Jones, Individually, Carlos Valdez as District Attorney for Nueces County and Kleberg County, Texas, and Nueces County and Kleberg County. The Plaintiff's Original Complaint asserted that the Plaintiff had been deprived of his rights pursuant to 38 U.S.C. § 2021-2026, recodified into 38 U.S.C. § 4301 *et seq.*, Veterans Re-Employment Rights Act ("VRRA"). The Plaintiff sought a court order restoring him to his former position or to a position of like seniority, status and pay pursuant to the VRRA and judgment against Defendants for lost pay, benefits and costs of court.

Motions to Dismiss for Failure to State a Claim were filed by Defendants. Defendants Grant Jones and Carlos Valdez in their individual capacities were dismissed. All Motions to Dismiss for Failure to State a Claim were denied by the trial court.

Motions for Summary Judgment were filed by Defendants. The Defendants Motions for Summary Judgment were denied by order of the trial court. This case proceeded to a bench trial which commenced on May 9, 1995.

After the close of evidence, the trial court granted judgment for Defendant-Kleberg County as to Plaintiff's claims for damages and restoration under 38 U.S.C. § 4301 *et seq.* ("VRRA").

After the close of evidence, the court granted judgment as to Defendant-Nueces County finding that Defendant-Nueces County was not the employer of the Plaintiff. The trial court entered its Findings of Fact and Conclusions of Law on June 22, 1995, as well as signing a final judgment in favor of Defendants Carlos Valdez, Kleberg County and Nueces County on June 21, 1995. The final judgment further provided that costs of suit were to be assessed against the Plaintiff.

The Plaintiff gave and filed his notice of appeal. The Court of Appeals held that: (1) the employer had the right to refuse reinstatement of reservist after returning from active service; (2) the employee was on notice that his receipt of sexually explicit materials at his office was prohibited by his employer, providing cause to terminate employee; (3) the district court did not err in concluding that Nueces County for which employee had worked as assistant district attorney was not his employer under VRRA; and (4) the district court erred in assessing costs against employee.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Opinion Directly Conflicts With the Veterans Reemployment Rights Act (VRRA), Specifically 38 U.S.C.A. § 4301 *et seq.*, And *Hilton; Monroe; Hillman;* And *Cole.*

The decision below is in direct conflict with the Veterans Reemployment Rights Act (VRRA) and more specifically 38 U.S.C.A. § 4301 *et seq.* *See* App. B at page B-1. In addition, the Fifth Circuit's opinion directly conflicts with the Supreme Court's opinion in *Hilton v.*

Sulephen; 334 U.S. 323, 68 S.CT. 1020 (1948); the Supreme Court's opinion in *Monroe v. Standard Oil Co.*; 452 U.S. 549, 101 S.CT. 2510; the Eighth Circuit's opinion in *Hillman v. Arkansas Highway & Transportation* Department; 39 F.3d 197 (8th Cir. 1994); and the Fifth Circuit's own opinion in *Cole v. Swint*; 962 F.2d. 58 (C.A.5th Cir. 1992). Certiorari is appropriate here.

The Supreme Court in *Monroe* (a VRRA case) held that the courts must deal with the law as it is. Further, the Supreme Court found and so held in *Fishgold v. Sulllivan Drydock & Repair Corp.*; 328 U.S. 275, 66 S.CT. 1105; *Accord, Coffy v. Republic Steel Corp.*; 447 U.S. 191, 100 S.CT. 2100; and *Alabama Power Company v. Davis*; 431 U.S. 581, 97 S.CT. 2002 that any construction of reemployment right statutes are to be "liberally construed for the benefit of those who . . . serve their country.".

The Fifth Circuit cited *Burkhart v. Post Browning, Inc.*; 859 F.2d. 1245, (C.A. 6th Cir. 1988) and *Sawyer v. Swift & Co.*; 836 F.2d. 1257, 1260-61 (10th Cir. 1988) in support of their opinion that if an employer has sufficient cause to terminate an employee veteran or reservist at the time that he leaves for active service or training, the VRRA does not require the employer to reinstate the employee before the employer terminates him for cause. This opinion not only is in direct conflict with the Supreme Court's opinions cited above, but it did not take into account the Supreme Court's opinion in *Hilton* wherein the Court specifically stated that where Congress passed the bill with full knowledge that long-standing absolute retention preferences of veterans would be embodied in the Act, the responsibility of the Supreme Court is to interpret the Act,

not to overrule the Congressional policy. If Congress had intended to grant employers some type of good cause exception or given the employer some retroactive ability to terminate a veteran, it could have done so, but rather chose to make reinstatement rights mandatory in the Act.

The Eighth Circuit in *Hillman* stated that it examined the legislative history of the Selective Training and Service Act of 1940 (the predecessor to 38 U.S.C. § 4301, *et seq.*) and found nothing which faintly suggests that Congress intended its language to be less mandatory than implied by the words it used. The Eighth Circuit provided that a veteran that meets the prerequisites of the statute (which was the case below) **must** be reemployed as his first guarantee and he cannot be discharged within one year except for cause. The opinion below conflicts with these congressionally mandated guarantees and is even in conflict with its own opinion in *Cole* wherein the Fifth Circuit stated that the Veterans Reemployment Rights Act is to be liberally construed for the benefit of reservists and guardsmen. The opinion below engrafted this exception in light of the VRRA's guarantee to a returning protection and even in light of the trial court which found that the Act was mandatory and that the Petitioner was still qualified to perform the duties of an assistant district attorney for the 105th Judicial District.

While the Fifth Circuit in its opinion below tried to effectuate some type of judicially created exception to the mandatory provision of the Act, that decision did not take into account the literal wording of the statute, the guarantees to a returning veteran and judicial opinions

which have held that the VRRA is to be liberally construed for the benefit of reservists and guardsmen.

The reasoning of the Fifth Circuit has created an exception to the VRRA which Congress could have but did not promulgate as well as creating conflicting results not only with the Supreme Court's interpretation of the Act but other circuit courts as well. In the cases relied on by the Fifth Circuit, the veteran was allowed to return to work and subsequently discharged. In the instant case, the veteran was never given that most precious right as guaranteed by Congress, and therefore, the conflict is clear and irreconcilable. Accordingly, the court below has entered a decision in conflict with the decision of other Courts of Appeal on the same important matter and has decided an important federal question in a way that conflicts with relevant decisions of the United States Supreme Court. Further, this is an issue that has not and should be settled by the U. S. Supreme Court. Certiorari is appropriate.

II. The Fifth Circuit's Opinion Directly Conflicts With the Veterans Reemployment Rights Act (VRRA), And *Carter*.

The Fifth Circuit opinion which dealt with a review of the good cause standard as stated in the D.C. Circuit Court's ruling in *Carter* under the clearly erroneous standard and is in conflict with the facts presented, or alternatively, such finding is not protected by the clearly erroneous ruling pursuant to Fed. R. Civ. Proc. 52(a) when there are mixed questions of law and fact.

The decision below is in conflict with the standards as set out in *Carter v. United States of America*; 407 F.2d. 1238 (Dist. Col. Cir. 1968). The factual review by the Fifth Circuit under the clearly erroneous standard should have led the court below to reach a firm and definite conviction that a mistake had been made therefore requiring reversal, or alternatively, the use of the clearly erroneous standard was improper when there were mixed questions of law and fact.

The D.C. Circuit in *Carter*, a VRRA case, held that an employer can terminate a veteran or reservist for cause if the discharge satisfies two criteria of reasonableness: (1) that it is reasonable to discharge employees because of certain conduct, and (2) that the employee had fair notice, express or fairly implied, that such conduct would be grounds for discharge. The Fifth Circuit held that the ultimate issue is whether the conduct was or should have been known to the employee to be prohibited by the employer.

Although the Fifth Circuit in its opinion below used the clearly erroneous standard when reviewing the facts and evidence produced at the trial court, the Fifth Circuit opinion was improperly based on the facts presented to the trial court under the clearly erroneous standard, and certainly, the facts if freely reviewable by the Appellate Court when there are mixed questions of fact and law as in the instant case, clearly show the standards in *Carter* were not met, therefore discharge was not proper.

The Fifth Circuit, in applying the notice standard as enumerated in *Carter*, found that the Petitioner's employer had a policy against having sexually explicit materials in the office.

However, this policy was not initiated nor relayed to the Petitioner so as to give the Petitioner express or fairly implied notice that such possession of materials would be grounds for discharge. Accordingly, under *Carter*, Petitioner's employer should not have been able to discharge the employee. The evidence and facts produced at trial were (1) the employer testified he did not believe in private censorship; (2) he was not willing to prosecute cases involving removal of adult material from public store shelves even though the Petitioner requested that certain citizens were asking for that to be done; (3) the employer stated that it was O.K. to have materials of a sexual nature so long as they weren't on top of the desk; (4) there was no office policy, verbal or in writing, in effect at the time of Petitioner's tenure with Respondents; (5) there was no office policy prohibiting personal mail at the office; (6) the employer himself received personal mail at the office; (7) there were never any complaints from anyone, including employees, citizens, police officers, attorneys or anyone else remotely related to the D.A.'s office, that Petitioner's magazines were offensive; and (8) there was no evidence that the Petitioner lacked skill, confidence, and diligence such to a degree as to constitute grounds for discharge, which are usually the only acts that would warrant discharge as the Eighth Circuit enumerated in *Hillman v. Arkansas Highway & Transportation Department*, 39 F.3d 197 (8th Cir. 1994).

The only evidence before the court below was that Petitioner was a loyal, diligent and competent employee who opened and closed over 700 cases per year in a severely understaffed and overworked district attorney's office. Accordingly, under any standard of review, there

were no facts to rise to the level as the court below indicated which in any way have given the Petitioner fair notice, express or implied, that such conduct would be grounds for discharge given his employers own testimony that possession of adult reading material was permissible so long as it was kept off an employee's desk.

The Petitioner was never given any warnings or instructions respecting possession of adult materials, and in fact, the materials that the employer eventually complained of were unsolicited by the employee. The court in *Carter* held that cause does not exist to terminate a returning veteran unless the employer goes further than asserting his own subject feelings. The Petitioner's employer, Grant Jones, specifically testified that the mail he reviewed and which he relied upon in concluding good cause existed was a subjective type feeling on his part. The review of the facts, under either standard, clearly indicates there was a mixed question of fact and law thereby allowing free appellate review as well as the result should have been that a firm and definite conviction a mistake was made by the trial court which would support reversal by the court below. Accordingly, the court below has entered a decision in conflict with the decision of other Court's of Appeals on the same important matter and has decided an important federal question in a way that conflicts with relevant decisions of the United States Supreme Court. Certiorari is appropriate.

III. The Fifth Circuit's Opinion Directly Conflicts With The Definition Of An Employer As Was Found In The Beaumont Court of Appeals In *Davis* And The Waco Court Of Appeals in *R.E. Cox A*nd Is Contrary To The Liberal Construction Of The VRRA.

The decision below is in direct conflict with the Beaumont Court of Appeals decision in *Davis v. General Account Fire & Life Assurance Corporation*; 127 S.W.2d 526 (C.A.Tex. (Beau.) 1939) and Waco Court of Appeals in *R.E. Cox DryGoods Co., et al v. Kellog, et al*; 145 S.W.2d. 675, (C.A. Waco, *no writ* 1940) in determining the definition of an employer.

The Beaumont Court of Appeals in *Davis* stated that an employer is one who employs another to perform services in his affairs and who controls, or has the right to control, the physical acts of the other in the performance of a service. Further, the Waco Court of Appeals in *R.E. Cox* stated that a master is a principal who employs another to perform service in his affairs and has a right to control such employees physical conduct in performance of such service. The Fifth Circuit opined that since the Petitioner worked more on the Kleberg County Docket than the Nueces County Docket, then Kleberg County was his employer and affirmed the District Courts decision concluding that Nueces County was not Petitioner's employer.

Under either standard, clearly erroneous or freely reviewable, the evidence was clear the Petitioner's employer was Grant Jones and not Kleberg County. Grant Jones was the District Attorney for Kleberg, Kennedy and Nueces Countys and evidence was adduced he had the sole authority to control Petitioner's performance and where he was performing his prosecutorial duties. The evidence was that Petitioner performed work for Nueces County dockets and was required to do so by his employer. The Petitioner's employer, Grant Jones, had the sole authority to hire and fire assistant prosecutors and to decide which office they were going to work out of. If the Kleberg County office was in such a position that Petitioner could not have

been restored to that position, the Petitioner's employer, Grant Jones, was obviously in control of the Nueces County offices and was required to place Petitioner of like seniority, status and pay pursuant to 38 U.S.C. § 4301(a)(B)(i), which would have been the Nueces County office.

The decision below placed great emphasis on the amount of work done at the Kleberg County office versus the Nueces County office as well as from whom wages are paid. The opinion below did not give any construction or credence to Texas Law and the definition of an employer when such a construction would have rendered a different result. The conflict is clear and its results were improper. Accordingly, the court has decided an important question of Federal Law, that is who is an employer under the VRRA and such issue should be decided by the United States Supreme Court and the court below has decided an important federal question, i.e. who is an employer under the VRRA, in a way that conflicts with decisions of Texas State Courts. Certiorari is appropriate.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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ATTORNEY FOR PETITIONER
DAVID JORDAN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari was served in the manner indicated to the person listed below on this the 5th day of August, 1996:

CMRRR # Z 847 601 056
Mr. Gary E. Ramirez
CHAVES, GONZALES & RODRIGUEZ
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ATTORNEY FOR RESPONDENTS-KLEBERG COUNTY AND CARLOS VALDEZ IN HIS CAPACITY AS DISTRICT ATTORNEY FOR KLEBERG COUNTY

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J. MITCHELL CLARK

APPENDIX A

NOTICE: Although citation of unpublished opinions remains unfavored, unpublished opinions may now be cited if the opinion has persuasive value on a material issue, and a copy is attached to the citing document or, if cited in oral argument, copies are furnished to the Court and all parties. See General Order of November 29, 1993, suspending 10th Cir. Rule 36.3 until December 31, 1995, or further order.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

In re: DAVID M. JORDAN, Plaintiff/Appellant,
v.
GRANT JONES, DISTRICT ATTORNEY, Defendant
and
CARLOS VALDEZ, DISTRICT ATTORNEY;
NUECES COUNTY; KLEBERG COUNTY,
Defendants/Appellees.

No. 95-40488

United States Court of Appeals, Fifth Circuit.

May 8, 1996. ORDER AND JUDGMENT[1]

[1] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 95-40488

(Summary Calendar)

DAVID M JORDAN,

Plaintiff-Appellant,

versus

GRANT JONES, District Attorney,

Defendant

and

CARLOS VALDEZ, District Attorney; NUECES COUNTY; KLEBERG COUNTY,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas
(C-94-CV-38)

Before HIGGINBOTHAM, DUHÉ, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

David M. Jordan appeals the district court's judgment in the defendants' favor in his suit alleging a violation of the Veteran's Reemployment Rights Act ("VRRA" or "the Act"), 38 U.S.C. § 4301 *et seq.* We affirm the district court's judgment, but we vacate the district court's award of costs against Jordan.

---

* Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

I

Jordan was a reserve officer called to active duty for Operation Desert Storm. After he was honorably discharged from the Armed Forces, Jordan returned to Corpus Christi, Texas to resume his former position as an assistant district attorney of the 105th Judicial District of the State of Texas. The district attorney, Grant Jones, refused to reinstate Jordan because Jones's staff had discovered very explicit sexual material throughout Jordan's office while Jordan had been on active duty.

The sexually explicit materials, which the district court described as "base smut," had been mailed directly to the Kleberg County District Attorney's official post office box and was addressed to Jordan.[1] Jordan had been receiving these materials at the office before he left for Desert Storm, and they continued to arrive after he left. Two secretaries employed by Kleberg County discovered the materials when they were clearing Jordan's office to permit a substitute assistant district attorney to use Jordan's office and handle his case load while he was on duty. Jones decided that Jordan's conduct was cause for termination because he believed Jordan's reading materials could subject the district attorney's office to a Title VII hostile work environment lawsuit. Jones was also concerned about the negative impact such materials

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[1] Jordan admitted at trial that he had a stack two-foot high of sexually explicit magazines, books, and advertisements, many of which were "more sexually explicit than Hustler and would have been considered shocking to many people." The district court described the materials which were admitted at trial as depicting oral-genital contact, homosexual oral-genital contact, and graphic pictures of heterosexual and homosexual intercourse.

could have on his office's public image as an effective and credible arm of law enforcement. After Jordan rejected Jones's suggestion that Jordan retire quietly, Jones terminated Jordan.

Jordan then filed suit against the defendants for backpay and reinstatement alleging a violation of the VRRA. After a bench trial, the district court entered judgment for the defendants and awarded them costs. On appeal, Jordan argues that the district court erred (1) by finding that the VRRA did not require Kleberg County to automatically reinstate him; (2) by finding that Kleberg County had legally adequate cause to terminate him; (2) by finding that Nueces County was not Jordan's employer; and (3) by awarding costs to the defendants.

II

The VRRA provides that a person who leaves a permanent employment position with a State to perform training and service in the Armed Forces of the United States shall be restored to his former or a similar position if he is still qualified to perform the duties of the position, and he follows certain statutory requirements.[2] 38 U.S.C. § 4301(a)(2)(B)(I). Section 4301(b)(1)(A) provides that veterans who have been restored to their former positions cannot be discharged for one year after reemployment without cause. 38 U.S.C. § 4301(b)(1)(A).

The district court held that Kleberg County did not violate 38

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[2] The Act requires that the returning veteran receive a certificate demonstrating satisfactory completion of military service and make application for reemployment within ninety days after he is discharged. 38 U.S.C. § 4301(a).

U.S.C. § 4301(a)(2)(B) when it refused to reinstate Jordan because Jordan did not leave the district attorney's office in good standing. The district court concluded that since Kleberg County could have fired Jordan for cause before he left for active service, § 4301(a)(2)(B) did not require Kleberg County to reinstate Jordan after he returned. Jordan argues that § 4301(a)(2)(B) grants returning veterans a mandatory right of reinstatement regardless of whether they left their job in good standing or not. In the alternative, Jordan contends that even if he did not have a mandatory right of reinstatement, he was not on notice that his conduct was prohibited; therefore, Kleberg County did not have legally sufficient cause to terminate him.

"The Veterans' Act was drafted with the intent to shield a serviceman from discrimination by his employer, not to arm him with a sword to punish his employer for some perceived wrong unconnected to his status." *Burkart v. Post-Browning, Inc.*, 859 F.2d 1245, 1250 (6th Cir. 1988). Congress intended the VRRA to protect veterans and reservists from "discharge without cause" resulting from the veteran or reservist status, not to give employee veterans and reservists a preference over other employees. *Monroe v. Standard Oil Co.*, 452 U.S. 549, 560-61, 101 S. Ct. 2510, 2516-17, 69 L. Ed. 2d 226 (1981) (internal quotations marks omitted).

Jordan argues that Kleberg County had a mandatory duty under the VRRA to reinstate him when he returned from active service. However, an employer can terminate or refuse to reinstate a veteran or reservist once he returns from active service or training, if

the employer had legally sufficient cause to terminate the employee at the time that he left. *See Burkart*, 859 F.2d at 1248 (holding that because reservist only gave his employer fifteen minutes' notice of his intent to leave for three weeks of training, the employer had sufficient cause to refuse to reinstate the reservist when he returned from training); *Sawyer v. Swift & Co.*, 836 F.2d 1257, 1260-61 (10th Cir. 1988) (holding that employer properly terminated reservist for cause because reservist failed to give his employer adequate notice of his intent to leave for training). Therefore, we hold that if an employer has sufficient cause to terminate an employee veteran or reservist at the time that he leaves for active service or training, the VRRA does not require the employer to reinstate the employee before the employer terminates him for cause.

An employer can terminate a veteran or reservist for cause if the discharge satisfies two criteria of reasonableness: (1) "that it is reasonable to discharge employees because of certain conduct, and [(2)] that the employee had fair notice, express or fairly implied, that such conduct would be ground for discharge." *Carter v. United States*, 407 F.2d 1238, 1244 (D.C. Cir. 1968). In assessing the adequacy of an employee's notice, the ultimate issue is "whether the conduct was or should have been known to the employee to be prohibited by the employer." *Id.* at 1246. This is a question of fact which we review under the clearly erroneous standard. *Id.*

Jordan argues that Kleberg County could not terminate him for

cause based on his receipt of sexually explicit materials because he was not on notice that this behavior was prohibited by his employer. The trial court specifically found that Jordan knew that if anyone at the district attorney's office discovered his collection of sexually explicit materials, he would be terminated. The court found that Jordan knew that his actions were not within those reasonably and ordinarily accepted standards of personal conduct expected of employees in a public district attorney's office. The evidence at trial demonstrated that Jordan's boss, Grant Jones, had a policy against having sexually explicit materials in the office. Jones testified that he developed this policy after an incident occurred involving the display of a sexually explicit magazine in one of the offices. The only evidence to the contrary was Jordan's testimony that he believed he was allowed to have the materials at the office as long as they were not on his desk. Given the trial court's superior ability to assess the credibility of the witnesses, we conclude that the court's finding that Jordan knew his behavior was prohibited by his employer was not clearly erroneous. Accordingly, the district court did not err in concluding that Kleberg County had cause to terminate Jordan.

III

Jordan next argues that the district court erred in holding that Nueces County was not his employer and therefore not subject to liability under the VRRA. Section 4302 entitles an employee veteran to file suit against his employer if the employer fails to

comply with the VRRA. The term "employer" in § 4302 should be broadly construed to include the "one to whom the veteran provides services and from whom he receives wages," as well as those bodies to whom a veteran's "employer in the traditional sense, has delegated certain aspects of the employment relationship." *Bunnell v. New England Teamsters and Trucking Indus. Pension Fund,* 486 F. Supp. 714 (D. Mass. 1980), *aff'd,* 655 F.2d 451 (1st Cir. 1981).

The testimony at trial indicated that Jordan received his salary, vehicle, gas, and the furnishings for his office from Kleberg County. Although Jordan accepted ten guilty pleas and worked on two cases for the Nueces County office during his three year period as assistant district attorney, this amount of work is extremely insignificant in comparison to the seven to eight hundred cases that Jordan prosecuted for Kleberg County *each year*. Based on the foregoing evidence, we conclude that the district court did not err in concluding that Nueces County was not Jordan's employer.

IV

Finally, Jordan argues that the district court erred in assessing costs against him. Valdez and Kleberg County concede that it was error for the court to assess costs against Jordan. Nueces County cites an irrelevant statute, and simply states that if the court finds that the award of costs was in error, the error was harmless.

Section 4302 specifically provides:

> If any employer, who is a private employer of a State or political subdivision thereof, fails or refuses to comply with the provisions of [specified sections] of this title, the [appropriate] district court of the United States . . . shall

> have the power, upon filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. . . . Upon application to the United States attorney or comparable official . . . by any person claiming to be entitled to such benefits provided for in such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions. No fees or court costs shall be taxed against any person who may apply for such benefits. . . .

38 U.S.C. § 4302. One court has interpreted the "no fees shall be taxed" provision as being controlling only when the plaintiff applies to and is represented by a United States attorney or a comparable official. *See Newport v. Michelin Aircraft Tire Corp.*, 851 F. Supp. 1406, 1408 (W.D.Mo. 1994). Arguably, it is ambiguous whether the language "any person who may *apply* for such benefits" is meant to refer only to a person who makes "an *application* to the United States attorney or a comparable official," not one who pursues his rights under the VRRA through a private attorney. However, the legislative history accompanying the enactment of a subsequent provision of the VRRA, which applies to reemployments initiated on or after the first day after the 60-day period beginning on Oct. 13, 1994, convinces us that Congress intended § 4302 to prevent any person claiming benefits under the VRRA from being assessed costs. In describing the new provisions, the Senate Report states:

> New section 4322(c)(2) would provide that no fees or court costs could be charged or taxed against any

> individual pursuing a claim of a violation of his or her [rights under the VRRA]. If that individual were the prevailing party, the court could, in its discretion, award the individual reasonable attorney fees, expert witness fees, and other litigation expenses when not represented by the Attorney General. The prohibition against charging fees or costs exists in present section 4302. The Committee bill would authorize the award of attorney fees, expert witness fees, and other litigation expenses as a further effort to make servicemembers whole and not have them suffer any loss in realizing their reemployment rights.

S.Rep. No. 158, 103d Cong., 1st Sess. (1993). Accordingly, we conclude that Congress intended § 4302 to prohibit district courts from awarding costs against a person who is pursuing a claim of a violation of his rights under the VRRA irregardless of who represents him. Therefore, we hold that the district court erred in awarding costs for the defendants.

V

For the foregoing reasons, we AFFIRM the judgment of the district court in the defendants' favor and VACATE the award of costs against Jordan.

APPENDIX B

PART IV—GENERAL ADMINISTRATIVE PROVISIONS

CHAPTER 43—VETERANS' REEMPLOYMENT RIGHTS

Sec.		Sec.	
4301.	Right to reemployment of inducted persons; benefits protected.	4304.	Rights of persons who enlist or are called to active duty; Reserves.
4302.	Enforcement procedures.	4305.	Assistance in obtaining reemployment.
4303.	Reemployment by the United States, territory, possession, or the District of Columbia.	4306.	Prior rights for reemployment.
		4307.	Qualification for employment position.

HISTORICAL AND STATUTORY NOTES

Amendments

1992 Amendments. Section analysis. Pub.L. 102-568, Title V, § 506(b), Oct. 29, 1992, 106 Stat. 4340, completely renumbered analysis by substituting "4301" for "2021", "4302" for "2022", "4303" for "2023", "4304" for "2024", "4305" for "2025", "4306" for "2026" and "4307" for "2027".

§ 4301. Right to reemployment of inducted persons; benefits protected

(a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its territories, or possessions, or political subdivisions thereof, or the District of Columbia, such person shall—

(i) if still qualified to perform the duties of such position or able to become requalified with reasonable efforts by the employer, be restored to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position or able to become requalified with reasonable efforts by the employer, by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of the employer, be offered employment and, if such person so requests, be employed in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case;

(B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall—

(i) if still qualified to perform the duties of such position or able to become requalified with reasonable efforts by the employer, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position or able to become requalified with reasonable efforts by the employer, by reason of disability

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(A) if such position was in the employ of the United States Government, its territories, or possessions, or political subdivisions thereof, or the District of Columbia, such person shall—

(i) if still qualified to perform the duties of such position or able to become requalified with reasonable efforts by the employer, be restored to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position or able to become requalified with reasonable efforts by the employer, by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of the employer, be offered employment and, if such person so requests, be employed in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case;

(B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall—

(i) if still qualified to perform the duties of such position or able to become requalified with reasonable efforts by the employer, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position or able to become requalified with reasonable efforts by the employer, by reason of disability

sustained during such service, but qualified to perform the duties of any oth position in the employ of such employer or the employer's successor in intere be offered employment and, if such person so requests, be employed by su employer or the employer's successor in interest in such other position t duties of which such person is qualified to perform as will provide such pers like seniority, status, and pay, or the nearest approximation thereof consiste with the circumstances in such person's case,

unless the employer's circumstances have so changed as to make it impossible c unreasonable to do so. Nothing in this chapter shall excuse noncompliance wit any statute or ordinance of a State or political subdivision thereof establishin greater or additional rights or protections than the rights and protections estal lished pursuant to this chapter.

(b)(1)(A) Any person who is restored to or employed in a position in accordance wit the provisions of clause (A) or (B) of subsection (a) of this section shall be considered a having been on furlough or leave of absence during such person's period of training an service in the Armed Forces, shall be so restored or reemployed without loss o seniority, shall be entitled to participate in insurance or other benefits offered by th employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted int such forces, and shall not be discharged from such position without cause within on year after such restoration or reemployment.

(B) In the case of employer-offered health insurance, an exclusion or waiting period may not be imposed in connection with coverage of a health or physical condition of a person entitled to participate in that insurance under subparagraph (A), or a health or physical condition of any other person who is covered by the insurance by reason of the coverage of such person, if—

(i) the condition arose before or during that person's period of training or service in the Armed Forces;

(ii) an exclusion or waiting period would not have been imposed for the condition during a period of coverage resulting from participation by such person in the insurance; and

(iii) the condition of such person has not been determined by the Secretary to be service-connected.

(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.

(3) Any person who seeks or holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

(c) The rights granted by subsections (a) and (b) of this section to persons who left the employ of a State or political subdivision thereof and were inducted into the Armed Forces shall not diminish any rights such persons may have pursuant to any statute or ordinance of such State or political subdivision establishing greater or additional rights or protections.

(Added Pub.L. 93–508, Title IV, § 404(a), Dec. 3, 1974, 88 Stat. 1594, § 2021, and amended Pub.L. 94–502, Title VI, § 608(1), (2), Oct. 15, 1976, 90 Stat. 2406; Pub.L. 99–576, Title III, § 331, Oct. 28, 1986, 100 Stat. 3279; Pub.L. 102–12, § 5(a), Mar. 18, 1991, 105 Stat. 36; Pub.L. 102–25, Title III, § 340(a), Apr. 6, 1991, 105 Stat. 92; renumbered § 4301, Pub.L. 102–568, Title V, § 606(a), Oct. 29, 1992, 106 Stat. 4340.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1974 Act. House Report No. 93–792, Senate Conference Report No. 93–1240, see 1974 U.S.Code Cong. and Adm.News, p. 6313.

1976 Act. Senate Report No. 94–1243, see 1976 U.S.Code Cong. and Adm.News, p. 6241.

1986 Act. Senate Report No. 99–444 and Explanatory Statement, see 1986 U.S.Code Cong. and Adm.News, p. 6468.

1991 Act. House Report No. 102-16, see 1991 U.S. Code Cong. & Adm. News, p. 36.

1992 Acts. House Report No. 102-753 (I & II), see 1992 U.S. Code Cong. and Adm. News, p. 3646.

References in Text

The Military Selective Service Act, referred to in subsec. (a), Act June 24, 1948, c. 625, 62 Stat. 604, as amended which is classified principally to section 451 et seq. of the Appendix to Title 50, War and National Defense. Section 9(a) of such Act enacted section 459(a) of the Appendix to Title 50. For complete classification of this Act to the Code, see References in Text note set out under section 451 of the Appendix to Title 50 and Tables.

Amendments

1991 Amendments. Subsec. (a)(2)(A). Pub. L. 102-25, § 340(a)(1), inserted "or able to become requalified with reasonable efforts by the employer" after "perform the duties of such position" each place it appeared.

Subsec. (a)(2)(B). Pub. L. 102-25, § 340(a)(2), inserted "or able to become requalified with reasonable efforts by the employer" after "perform the duties of such position" each place it appeared.

Subsec. (b)(1)(A), (B). Pub.L. 102-12 designated existing text as subpar. (A) and added subpar. (B).

1986 Amendment. Subsec. (b)(3). Pub.L. 99-576 substituted "who seeks or holds" for "who holds", added "hiring" following "shall not be denied" and substituted "employment, or any promotion" for "employment or any promotion".

1976 Amendment. Subsec. (a)(2)(B). Pub.L. 94-502, § 608(1), substituted "the employer's" for "his" in three places.

Subsec. (b)(2). Pub.L. 94-502, § 608(2), substituted "in the person's employment as the person" for "in his employment as he".

Effective Dates

1991 Acts. Section 5(c) of Pub.L. 102-12 provided that: "The amendments made by this section [enacting section 693 of Appendix to Title 50, War and National Defense, and amending this section] shall take effect as of August 1, 1990."

Section 340(b) of Pub. L. 102-25 provided that: "The amendments made by this section [amending this section] shall take effect as of August 1, 1990."

1976 Act. Amendment by Pub.L. 94-502 effective Dec. 1, 1976, see section 703(c) of Pub.L. 94-502, set out as a note under section 1793 of this title.

1974 Act. Section effective Dec. 3, 1974, see section 603 of Pub.L. 93-508, set out as a note under section 1652 of this title.

Reaffirmation of Recognition of National Guard and Reserve Forces

Pub.L. 99-290, § 1, May 2, 1986, 100 Stat. 413, provided that:

"(a) Findings.—The Congress reaffirms its findings set out in section 1130(a) of Public Law 97-252 [set out as a note under this section] that—

"(1) the National Guard and Reserve forces of the United States are an integral part of the total force policy of the United States for national defense and need to be ready to respond, on short notice, to augment the active military forces in time of national emergency;

"(2) attracting and retaining sufficient numbers of qualified persons to serve in the Guard and Reserve is a difficult challenge during a period in which there is a decreasing number of young people from which to recruit; and

"(3) the support of employers and supervisors in granting employees a leave of absence from their jobs to participate in military training without detriment to earned vacation time, promotions, and job benefits is essential to the maintenance of a strong Guard and Reserve force.

"(b) Recognition of Members of Guard and Reserve.—It continues to be the sense of Congress that the citizen-military volunteers who serve the Nation as members of the National Guard and Reserve require and deserve public recognition of the essential role they play in the national defense, and particularly require and deserve the support and cooperation of their civilian employers, in order to be fully ready to respond to national emergencies.

"(c) Employer Support for Guard and Reserve.—The Congress reaffirms its statements expressed in section 1130(c) of Public Law 97-252 [set out as a note under this section] that it—

"(1) recognizes, and requests all citizens to recognize, the vital need for a trained, ready National Guard and Reserve in the national defense posture of the United States; and

"(2) urges and requests employers and supervisors of employees who are members of the National Guard or Reserve to abide by the provisions of chapter 43 of title 38, United States Code [this chapter], by—

"(A) granting a leave of absence for military training, exclusive of earned vacation, to employees who are members of the Guard and Reserve; and

"(B) providing such employees equal consideration for job benefits and promotions as all other employees."

Pub. L. 97-252, Title XI, § 1130, Sept. 8, 1982, 96 Stat. 759, provided that:

"(a) The Congress finds that—

"(1) the National Guard and Reserve Forces of the United States are an integral part of the total force policy of the United States for national defense and need to be ready to respond, on short notice, to augment the active military forces in time of national emergency;

"(2) attracting and retaining sufficient numbers of qualified persons to serve in the Guard and Reserve is a difficult challenge during a period in which authority to induct persons for training and service in the Armed Forces is not provided by law; and

"(3) the support of employers and supervisors in granting employees a leave of absence from their jobs to participate in military training without detriment to earned vacation time, promotions, and job benefits is essential to the maintenance of a strong Guard and Reserve force.

"(b)(1) It is, therefore, the sense of Congress that the citizen-military volunteers who serve the Nation as members of the National Guard and Reserve require and deserve public recognition of the essential role they play in the national defense, and particularly require and deserve the support and cooperation of their civilian employers, in order to be fully ready to respond to national emergencies.

"(2) The Congress recognizes, and requests all citizens to recognize, the vital need for a trained, ready National Guard and Reserve in the national defense posture of the United States and urges and requests employers and supervisors of employees who are members of the National Guard or Reserve to abide by the provisions of chapter 43 of title 38, United States Code [this chapter], by granting a leave of absence for military training, exclusive of earned vacation, to employees who are members of the Guard and Reserve and by providing such employees equal consideration for job benefits and promotions as all other employees."

Reference to Transferred Sections

Section 506(c)(6) of Pub.L. 102-568, provided that: "Any reference in a provision of law to a section redesignated by subsection (a) [sections 2021-2027 redesignated sections 4301-4307 of this title], other than a provision specified in paragraphs (1) through (5) of this subsection [sections 4302, 4303(a)-(c) and 4304(d), (e) of this title; section 1204(a)(1) of Title 5, Government Organization and Employees; and section 706(c) of Title 10, Armed Forces], shall be deemed to refer to the section as so redesignated."

CROSS REFERENCES

Rights or benefits under this section for member required to take leave pending review of court-martial convictions, see 10 USCA § 706.

LIBRARY REFERENCES

American Digest System

Veterans' benefits; position restorable, see Armed Services ⇐118 et seq.

Veterans' benefits; reemployment in general, see Armed Services ⇐113 et seq.

Veterans' benefits; veterans entitled to reemployment, see Armed Services ⇐116 et seq.

Encyclopedias

Veterans' benefits; entitlement and prerequisites to reemployment, see C.J.S. Armed Services § 269 et seq.

Veterans' benefits; positions and benefits protected, see C.J.S. Armed Services § 276 et seq.

Veterans' benefits; reemployment rights in general, see C.J.S. Armed Services § 268 et seq.

Law Reviews

Intentional infliction of emotional distress in the employment at will setting: Limiting the employer's manner of discharge. 60 Ind.L.J. 365 (1984-85).

Reservists' rights to reemployment and benefits—Guidelines for employers. Margery Sinder Friedman and Mark A. Trank, 14 L.A.Law. 30 (March 1991).

The modern at-will employment doctrine: Myths and misperceptions. Andrew S. Brignone 551, No. 2 Inter Alia 5 (1986).

WESTLAW ELECTRONIC RESEARCH

Armed services cases: 34k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

NOTES OF DECISIONS

For additional Notes of Decisions relating to this section prior to renumbering, see § 2021.

I. GENERALLY

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21. Employer limitations on number of reservists

Kolkhorst v. Tilghman, 897 F.2d 1282 [main volume] certiorari denied 112 S.Ct. 865, 116 L.Ed.2d 771.

25. —— Laid off employees

Employer did not violate this chapter by failing to reemploy Marine Corps reservist on his return from active duty; although reservist was still receiving pay checks and benefits from his former job at time he reported to active duty, he had previously been told that his job would be affected by a reduction in force and he was in fact no longer working for his employer. Greene v. Advanced Micro Devices, Inc., W.D.Tex.1993, 824 F.Supp. 653.

31. —— Temporary employees

Ranch foreman's position was not a "temporary position" so as to preclude him from having reservist rights under the Veterans Reemployment Rights Act, based upon his working for the Army National Guard; foreman had written employment contract, was paid monthly salary for full-time employment, and lived on ranch, and, when he was terminated, employer hired replacement. Cole v. Swint, C.A.6 (Tex.) 1992, 961 F.2d 58.

36. —— Time for application

Returning veteran's application made prior to his discharge from military service constitutes

continuing and thus sufficient application for reemployment. Waidzunas v. Department of Veterans Affairs, M.S.P.B.1993, 56 M.S.P.R. 529.

45. —— Miscellaneous positions

A physician who was also member of the Armed Forces Reserve was entitled to reinstatement and back pay for violation of his rights under the Veteran's Reemployment Rights Act when he was "suspended" from employment upon his return from active duty in Operation Desert Storm, the evidence showed that an "investigation" of a pharmacy over which the physician had managerial authority was nothing more than a pretext used to prevent the physician from resuming the duties he had performed before he left to serve his country. Simmons v. Didario, E.D.Pa.1992, 796 F.Supp. 166.

46. Delay in reinstatement

Although agency could not have complied with the 30-day regulatory deadline for restoring employee to duty following military service where he made his demand for restoration more than 30 days before his discharge, employee who was available for work that day was entitled to be restored on the day after his discharge. Waidzunas v. Department of Veterans Affairs, M.S.P.B.1993, 56 M.S.P.R. 529.

51. —— Change in circumstances

Employer, who had already hired someone to take foreman's place living on ranch, did not establish change in circumstances making it unreasonable and impossible to rehire employee after firing him based on his need to have a Saturday off for Army National Guard commitment. Cole v. Swint, C.A.5 (Tex.) 1992, 961 F.2d 58.

58. Discharge of employee—Generally

Evidence supported district court's conclusion that employer fired ranch foreman for his absence of work on weekend because foreman told employer about his need to go on a weekend drill with the Army National Guard, despite testimony of employer that he believed foreman's statement to mean that he had decided to pursue another career, in the Army; foreman testified that he had told employer accurately that he had joined the Guard and needed Saturday off for his drill. Cole v. Swint, C.A.5 (Tex.) 1992, 961 F.2d 58.

68. Summary judgment

Genuine issues of material fact, precluding summary judgment for discharged truck driver in his action alleging that former employer suspended driver solely because of his National Guard membership, in violation of Veteran's Reemployment Rights Act (VRRA), existed as to whether driver's alleged insubordination and his failure to hold valid driver's license were reasons for his suspension. Tukesbrey v. Midwest Transit, Inc., W.D.Pa.1993, 822 F.Supp. 1192.

III. SENIORITY RIGHTS AND BENEFITS—PARTICULAR RIGHTS AND BENEFITS

134. Demotions

Requirement of restoration statute that returning veteran not be discharged "without cause" does not preclude agency from demoting veteran who has been promoted to a supervisory or managerial position for not satisfactorily completing probationary period. Hawkins v. Department of Treasury, M.S.P.B.1992, 52 M.S.P.R. 686.

140. Pensions

Airline pilot who withdrew his pension contributions upon entering active military service was entitled, under Veterans' Act, to participate in pension plan upon returning to work for airline on same terms as returning pilots who did not withdraw their contributions. Leonard v. United Air Lines, Inc., C.A.7 (Ill.) 1992, 972 F.2d 155.

§ 4302. Enforcement procedures

If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of section 4321(a), (b)(1), or (b)(3), or 4324 of this title, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions. Upon application to the United States attorney or comparable official for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, by any person claiming to be entitled to the benefits provided for in such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions. No fees or court costs shall be taxed against any person who may apply for such benefits. In any such action only the employer shall be deemed

*2100 *447 U.S. 191, 104 L.R.R.M. (BNA) 2488,*
65 L.Ed.2d 53,
88 Lab.Cas. P 12,074,
2 Employee Benefits Cas. 2446

Thomas E. COFFY, Petitioner,
v.
REPUBLIC STEEL CORP.

No. 79-81.
Supreme Court of the United States
Argued Feb. 27, 1980.
Decided June 10, 1980.

Steelworker, who returned to his employment following military service, sued the employer alleging violation of Vietnam Era Veterans' Readjustment Assistance Act because of refusal to consider his military service time in computing amount of supplemental unemployment benefits payable under bargaining agreement. The United States District Court for the Northern District of Ohio, William K. Thomas, J., rendered judgment for the employer, 461 F.Supp. 344. The Court of Appeals for the Sixth Circuit affirmed, 590 F.2d 334. Certiorari was granted. The Supreme Court, Mr. Justice Marshall, held that SUB payments were perquisites of seniority to which returning veterans were entitled under the Act where purpose and function of the plan was to provide economic security during periods of layoffs to employees who had been in the service of the employer for a significant period and, thus, benefits were in nature of reward for length of service and did not represent deferred short-term compensation for services actually rendered.

Judgment of Court of Appeals reversed and case remanded for further proceedings.

1. ARMED SERVICES k123(1)
34 ---
34III Veterans' Benefits
34III(A) In General
34k123 Readjustment Assistance and Allowances
34k123(1) In general.

Formerly 34k123, 34k101

U.S.Ohio 1980.

Vietnam Era Veterans' Readjustment Assistance Act is to be liberally construed for the benefit of the returning veteran. 38 U.S.C.A. Secs. 2021 et seq., 2021(a)(B)(i), (b)(1, 2).

2. ARMED SERVICES k118(4)
34 ---
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k118 Position Restorable
34k118(4) Seniority.

U.S.Ohio 1980.

Under the Vietnam Era Veterans' Readjustment Assistance Act, the returning veteran steps back on the seniority escalator at the precise point he would have occupied had he kept his position with his employer continuously during the period of military service. 38 U.S.C.A. Secs. 2021 et seq., 2021(a)(B)(i), (b)(1).

3. ARMED SERVICES k118(4)
34 ---
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k118 Position Restorable
34k118(4) Seniority.

U.S.Ohio 1980.

A two-pronged test determines whether a benefit is a "perquisite of seniority" under Vietnam Era Veterans' Readjustment Assistance Act: first, there must be a reasonable certainty that the benefit would have accrued if the employee had not gone into the military service and, second, nature of the benefit must be a reward for length of service rather than a form of short-term compensation for services rendered. 38 U.S.C.A. Secs. 2021 et seq., 2021(b)(1).

See publication Words and Phrases for other judicial constructions and definitions.

4. ARMED SERVICES k118(4)
34 ---
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k118 Position Restorable
34k118(4) Seniority.

U.S.Ohio 1980.

A de facto 32-hour minimum workweek did not mean that supplementary unemployment benefits provision of steelworkers' bargaining agreement was intended as deferred compensation for work

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performed rather than a seniority benefit to which returning veterans were entitled under Vietnam Era Veterans' Readjustment Assistance Act as credits were earned for weeks in which employee was paid for hours not worked and such hours were not subject to any 32-hour industry custom and, also, under bargaining agreement the normal workweek was 40 hours and SUB plan made no provision for accrual of additional credits for hours worked over 32 per week, or for overtime work. 38 U.S.C.A. Secs. 2021 et seq., 2021(b)(1).

5. ARMED SERVICES k118(4)
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k118 Position Restorable
34k118(4) Seniority.

U.S.Ohio 1980.

Even if eligibility for supplemental unemployment benefits payable under steelworkers' bargaining agreement were closely related to hours worked, such fact would not, by itself, render SUB payments compensation rather than "seniority rights" to which returning veterans were entitled under Vietnam Era Veterans' Readjustment Assistance Act since it is the nature of the benefit, not the formula by which it is calculated, that is the crucial factor in determining whether a benefit is a reward for length of service or a form of short-term compensation for services rendered. 38 U.S.C.A. Secs. 2021 et seq., 2021(b)(1).

See publication Words and Phrases for other judicial constructions and definitions.

6. ARMED SERVICES k118(4)
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k118 Position Restorable
34k118(4) Seniority.

U.S.Ohio 1980.

A benefit need not be meticulously proportioned to longevity of service to constitute a perquisite of the "seniority" to which a returning veteran is entitled under Vietnam Era Veterans' Readjustment Assistance Act, as long as it performs a function akin to traditional forms of seniority. 38 U.S.C.A. Secs. 2021 et seq., 2021(b)(1).

See publication Words and Phrases for other judicial constructions and definitions.

7. ARMED SERVICES k118(4)
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k118 Position Restorable
34k118(4) Seniority.

U.S.Ohio 1980.

Supplemental unemployment benefits plan of steelworkers' bargaining agreement, under which an employee accrued credits for each week in which he worked or was paid for hours not worked, with a maximum of 52 credits accruable and with an employee who had completed two years' continuous service entitled to one week of benefits for each accumulated credit, was a "perquisite of seniority" for purpose of Vietnam Era Veterans' Readjustment Assistance Act as purpose was to provide economic security during layoffs and, hence, provision that an employee who entered military service would be deemed on leave of absence and would not accumulate credits conflicted with the Act. 38 U.S.C.A. Secs. 2021 et seq., 2021(a)(B)(i), (b)(1).

See publication Words and Phrases for other judicial constructions and definitions.

2101 Syllabus (FN)

The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (Act) provides that any person who leaves a permanent job to enter the military, satisfactorily completes military service, and applies for re-employment within 90 days of being discharged *2102 from the military must be reinstated to the former job "without loss of seniority," 38 U.S.C. Sec. 2021(b)(1). Upon being honorably discharged from military service, petitioner made timely application for reinstatement with respondent, his former employer. Because respondent was then in the process of laying off employees, petitioner was reinstated in layoff status. While laid off, he received weekly payments under the supplemental unemployment benefits (SUB) plan created by the applicable steel industry collective-bargaining agreement. Under the plan, an employee is entitled to receive SUB payments only if he has completed two years of continuous service prior to being laid off, and the amount of the weekly benefit is determined by his hourly wage rate, the

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number of his dependents, the amount of state unemployment compensation he is receiving, and the level of funding remaining in the plan. The length of time during which an employee receives SUB payments is determined by the number of credit units he has accumulated before being laid off, with one-half credit being accrued for each week in which he worked "any" hours, or was paid for "any" hours not worked (such as for vacation or jury duty), or lost "any" hours because he was performing certain union duties or was on disability leave. The plan also provides that if an employee enters the Armed Services, only the credit units credited to him at the time of his entry into the service shall be credited to him upon reinstatement as an employee with unbroken continuous service, except as may otherwise be required by law. Petitioner received SUB payments for only 25 weeks, whereas if he had been employed by respondent during his period of military service, he would have been entitled to 52 weeks of payments. Alleging that respondent violated his statutory re-employment rights by refusing to consider his military service time in computing the amount of SUB payments to which he was entitled, petitioner, represented by the Department of Justice pursuant to the Act, filed an action [447 U.S. 192] in Federal District Court, which ultimately held that SUB payments were not a perquisite of seniority entitled to statutory protection. The Court of Appeals affirmed.

Held : SUB payments provided pursuant to the steel industry collective-bargaining agreement are perquisites of seniority to which a returning veteran is entitled under the Act. Pp. 2104-2109.

(a) Under the Act, which is to be liberally construed for the returning veteran's benefit, the veteran steps back on the seniority escalator at the precise point he would have occupied had he kept his position with his employer continuously during the period of military service. Cf. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 66 S.Ct. 1105, 90 L.Ed. 1230. In determining whether a particular benefit qualifies as a perquisite of seniority under the Act, first, there must be a reasonable certainty that the benefit would have accrued if the employee had not gone into the military service, and, second, the "real nature" of the benefit must be "a reward for length of service," rather than "a form of short-term compensation for services rendered." Alabama Power Co. v. Davis, 431 U.S. 581, 589, 97 S.Ct. 2002, 2007, 52 L.Ed.2d 595. Pp. 2104-2105.

(b) The SUB plan satisfies the reasonable-certainty prong of the Alabama Power test, since if petitioner had remained continuously employed by respondent instead of entering the military, he would have accumulated credits from the date he was hired until the date he was laid off. The plan also satisfies the second prong of the test, because supplemental unemployment benefits are not a form of deferred short-term compensation, but are a reward for length of service closely analogous to traditional forms of seniority. The purpose and function of SUB plans is to provide economic security during periods of layoff to employees who have been in the service of the employer for a significant period, and the specific provisions of the steel industry SUB plan support this general purpose of SUB programs. Pp. 2106-2109.

6th Cir., 590 F.2d 334, reversed and remanded.

*2103 Alan I. Horowitz, Asst. Sol. Gen., Washington, D.C., for petitioner, pro hac vice, by special leave of Court.

Michael A. Nims, Cleveland, Ohio, for respondent.

[447 U.S. 193] Mr. Justice MARSHALL delivered the opinion of the Court.

The Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. Sec. 2021 et seq., provides that any person who leaves a permanent job to enter the military, satisfactorily completes military service, and applies for re-employment within 90 days of being discharged from the military must be reinstated to the former job without loss of seniority. This case presents the question whether supplemental unemployment benefits provided pursuant to the steel industry collective-bargaining agreement are perquisites of seniority to which a returning veteran is entitled under the statute.

I

Petitioner Thomas Coffy was employed by respondent Republic Steel Corp. (Republic) from April 30, 1968, until September 17, 1968, and again from January 24, 1969, until September 9, 1969, when he entered military service. He served in the military until he was honorably discharged on August 16, 1971. He made timely application for reinstatement on September 14, 1971. Because Republic was then in the process of laying off employees and Coffy would already have been laid off if he had remained continuously employed during his

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period of military service, he was reinstated in lay-off status. Coffy was recalled to work on July 1, 1972.

While Coffy was laid off, he received weekly payments under the supplemental unemployment benefits (SUB) plan created by the collective-bargaining agreement between the major steel companies, including Republic, and the United Steelworkers of America (Steelworkers). Coffy received SUB payments for 25 weeks. (FN1) If he had been employed by Republic during his period of military service, he would have been [447 U.S. 194] entitled to 52 weeks of SUB payments. Coffy, represented by the Department of Justice pursuant to 38 U.S.C. Sec. 2022, filed this action in the United States District Court for the Northern District of Ohio, alleging that Republic violated his statutory re-employment rights by refusing to consider his military service time in computing the amount of SUB payments to which he was entitled. (FN2)

The District Court, relying on Foster v. Dravo Corp., 420 U.S. 92, 95 S.Ct. 879, 43 L.Ed.2d 44 (1975), entered judgment for respondent. The court held that the plan was "a bona fide effort to relate qualification for weekly benefits . . . to work actually performed," App. to Pet. for Cert. 24a, and therefore the benefits were not a perquisite of seniority. While the case was pending on petitioner's appeal to the United States Court of Appeals for the Sixth Circuit, we held in Alabama Power Co. v. Davis, 431 U.S. 581, 97 S.Ct. 2002, 52 L.Ed.2d 595 (1977), that pension benefits are perquisites of seniority protected under the statute. The Court of Appeals sua sponte vacated the District Court's judgment and remanded for reconsideration in light of Alabama Power.

On remand, the District Court adhered to its decision that SUB credits are not seniority rights entitled to statutory protection. 461 F.Supp. 344 (1978). The Court of Appeals affirmed on the opinion of the District Court. 590 F.2d 334 (1978). We granted *2104 certiorari, 444 U.S. 924, 100 S.Ct. 261, 62 L.Ed.2d 180 (1979), to resolve a conflict among the Circuits concerning this important question in the interpretation of the statute. (FN3) We now reverse.

[447 U.S. 195] II

[1][2] The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (Act), 38 U.S.C. Sec. 2021 et seq., requires that returning veterans be reinstated to the jobs they left for military service "or to a position of like seniority, status, and pay." Sec. 2021(a)(B)(i). (FN4) The Act further provides that the veteran [447 U.S. 196] be reinstated "without loss of seniority." Sec. 2021(b)(1). We interpreted the predecessor of Sec. 2021 (FN5) to mean that the returning veteran "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284-285, 66 S.Ct. 1105, 1111, 90 L.Ed. 1230 (1946). Congress incorporated this principle into the present statute by providing that any person reinstated under the Act should be given "such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously" during the period of military service. Sec. 2021(b)(2). The statute is to be liberally construed for the benefit of the returning veteran. Fishgold v. Sullivan Drydock & Repair Corp., supra, at 285, 66 S.Ct., at 1111.

We have several times had occasion to consider whether a particular type of benefit is a perquisite of seniority. Accardi v. Pennsylvania R. Co., 383 U.S. 225, 86 S.Ct. 768, 15 L.Ed.2d 717 (1966), involved a claim *2105 for severance pay. The amount of the payment depended on the employee's length of "compensated service." Id., at 228, 86 S.Ct., at 770. We rejected the employer's argument that the payment was not based on seniority, but on total service to the company. Rather, we held, the "real nature" of the payments was compensation for the loss of the job. Id., at 230, 86 S.Ct., at 772. Because "the cost to an employee of losing his job is not measured by how much work he did in the past . . . but by the rights and benefits he forfeits by giving up his job"--rights and benefits that [447 U.S. 197] are largely determined by seniority--the severance payment was "just as much a perquisite of seniority as the more traditional benefits such as work preference and order of lay-off and recall." Ibid.

We reached a different result in evaluating a claim for vacation benefits in Foster v. Dravo Corp., 420 U.S. 92, 95 S.Ct. 879, 43 L.Ed.2d 44 (1975). The real nature of that benefit, we observed, was reflected in "the common conception of a vacation as a reward for and respite from a lengthy period of labor," id., at 101, 95 S.Ct., at 884. The contractual provisions for additional vacation credits and higher benefits for overtime work and for pro rata vacations for employees laid off before achieving the necessary

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number of weeks worked supported that conception. Accordingly, we held that vacation pay was intended as a form of deferred short-term compensation for work actually performed and was not, therefore, a seniority right protected by the statute.

[3] Most recently, in Alabama Power Co. v. Davis, 431 U.S. 581, 97 S.Ct. 2002, 52 L.Ed.2d 595 (1977), we held that pension benefits were perquisites of seniority for purposes of the Act. Although the amount of the payment was directly dependent on the years of accredited service, the true nature of the benefits was "a reward for length of service," id., at 593, 97 S.Ct., at 2009. The lengthy period required for vesting, the use of payment formulas based on earnings at the time of retirement, and "the function of pension plans in the employment system"--namely, to provide financial security to employees, assure a stable work force, and increase efficiency--all led to the conclusion that pension payments "are predominantly rewards for continuous employment with the same employer." Id., at 594, 97 S.Ct., at 2010. In Alabama Power, we summarized the principles that have emerged from the cases and concluded that they establish a two-pronged test for determining whether a benefit is a perquisite of seniority under the Act. First, there must be a reasonable certainty that the benefit would have accrued if the employee had not gone into the military service. Id., at 589, 97 S.Ct., at 2007. Second, the nature of the benefit must be "a reward for length of service," rather [447 U.S. 198] than a form of "short-term compensation for services rendered." Ibid.

Our task, then, is to evaluate the SUB plan at issue in this case in light of these principles.

III

A

The first SUB plan for the steel industry was established through collective bargaining in 1956. The revised plan which is the subject of this action became effective January 1, 1969. The plan provides three types of benefits: a "weekly benefit," a "short week benefit," (FN6) and a relocation allowance. Petitioner's claim involves weekly benefits, which are provided to employees laid off from work as a supplement to unemployment compensation benefits provided under state law. The amount of an employee's weekly SUB payment is determined by his hourly wage rate, the number of his dependents, the amount of state unemployment compensation he is receiving, and the level of funding remaining in the plan. The length of time during which the employee receives SUB payments is determined by the number of credit units he has accumulated before being laid off.

*2106 Section 2.0 of the plan provides that an employee accrues one-half credit for each week in which he worked any hours, or was paid for any hours not worked (such as for vacation or jury duty), or lost any hours because he was performing certain union duties or was on disability leave. (FN7) A maximum of 52 credit units may be accrued by an employee at any one time. An employee is entitled to receive SUB payments only if he has completed two years of continuous service prior to [447 U.S. 199] being laid off. An employee who meets this threshold requirement may receive one week of supplemental unemployment benefits for each credit unit he has accumulated.

The plan also provides, in Sec. 7.2:

"If an employee enters the armed services directly from the employment of the Company, he shall, while in service, be deemed for the purposes of the Plan to be on leave of absence and shall not be entitled to any Benefit. Only the credit units credited to him at the time of his entry into such service shall be credited to him upon his reinstatement as an employee of the Company with unbroken continuous service, except as may otherwise be required by law."

Under this provision Republic declined to credit petitioner for his military service time in calculating the number of SUB payments to which he was entitled . (FN8) We must determine whether the provision is in conflict with the Act.

B

The SUB plan satisfies the reasonable-certainty prong of the Alabama Power test, since if Coffy had remained continuously employed by Republic instead of entering the military, he would have accumulated credits from the date he was hired until the date he was laid off. We conclude that the plan also satisfies the second prong of the test, because supplemental unemployment benefits are not a form of deferred short-term compensation, but are a reward for length of service closely analogous to traditional forms of seniority.

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[447 U.S. 200] The concept of supplemental unemployment benefits evolved from the demand by organized labor for a guaranteed annual wage. When it became evident that a guaranteed annual wage was impractical in their industries, unions such as the Steelworkers and the United Auto Workers transformed their guaranteed annual wage demands into proposals to supplement existing unemployment compensation programs. These proposals ultimately were adopted in several industries in the form of SUB plans. See J. Becker, Guaranteed Income for the Unemployed: The Story of SUB 9-20 (1968); A. Freedman, Security Bargains Reconsidered: SUB, Severance Pay, Guaranteed Work 4-5 (The Conference Board 1978). From the beginning, then, the purpose of SUB plans was to provide employment security regardless of the hours worked rather than to afford additional compensation for work actually performed. From the employer's standpoint SUB's, like pension benefits, help to assure a stable work force through periods of short-term layoffs and, like severance payments, may increase management flexibility in implementing technological advances. See Becker, supra, at 55-57, 248.

The essential function of SUB plans is to provide economic security for regular employees in the event they are laid off. Protection against layoff is, of course, one of the traditional attributes of seniority. SUB *2107 payments provide a second-level protection against layoff. If an employee does not have sufficient seniority to avoid being laid off, he may still have achieved the minimum level of seniority necessary to receive SUB payments during his layoff. Unlike vacations, SUB's cannot be compensation for work performed, a "reward for and respite from a lengthy period of labor," Foster v. Dravo Corp., 420 U.S., at 101, 95 S.Ct., at 884, for they are contingent on the employee's being thrown out of work; unless the employee is laid off he will never receive SUB payments. In this sense, SUB's are analogous to severance payments: they are "compensation for loss of jobs." Accardi, 383 U.S., at 230, 86 S.Ct., at 772. See Freedman, supra, at 2.

[447 U.S. 201] We turn now to the specific provisions of the steel industry SUB plan to determine whether they support or contradict our understanding of the general purpose of SUB programs. The District Court held that the availability of SUB payments was so closely related to hours actually worked as to demonstrate that the plan was a " 'bona fide effort to [compensate for] work actually performed.' " 461 F.Supp., at 346. That conclusion is at odds with the literal terms of the plan, which provide that SUB credits are earned for all weeks in which an employee has any hours in one of the three categories specified in Sec. 2.0. This provision was the result of a 1962 modification of the original 1956 plan, which had directly correlated hours worked with credits earned by providing that 1/10 credit would be earned for every eight hours worked, up to a maximum of 1/2 unit per week. The District Court recognized that the present plan did not expressly relate entitlement to benefits to hours worked, but found this fact to be of no significance because " '[c]ircumstances existing in the steel industry, as revealed by the uncontradicted evidence in this case, demonstrate that, in practice, the minimum workweek is 32 hours. . . . The plan must be construed in light of actual conditions in the steel industry. The possibility of an employee working only one hour during any week does not exist.' " Id., at 347. (FN9)

[4] [447 U.S. 202] We of course accept the District Court's factual findings concerning the practice in the industry. We do not agree, however, that a de facto 32-hour minimum work week means that SUB's are intended as deferred compensation for work performed. Credits are also earned for weeks in which the employee is paid for any hours not worked, as for jury duty, or in which any hours are lost because the employee is disabled or performing certain union duties. These hours, even if considered similar to hours worked because the employee receives "wage substitutes" for them, are not subject to the 32-hour industry custom.

We observe also that the normal work-week in the industry, as provided by Art. 6, Sec. 1, of the collective-bargaining agreement, is 40 hours, not 32. The SUB plan makes no provision for accrual of additional credits for hours worked over 32 per week, or for overtime work. This omission is not suggestive of a desire to compensate work actually performed.

Further, a major reason that it is rare for an employee who works at all to work fewer than 32 hours in a week is the "short week benefit" provided under the SUB plan. (FN10) Qualified[447 U.S. 203] employees who work *2108 some hours, but fewer than 32, receive benefits under the short-week provisions of the plan; those who do not work at all receive weekly benefits. The union's success in effectively achieving a guaranteed 32-hour week through the mechanism of the short-week benefit does not logically alter the nature of the weekly benefit negotiated as part of the same plan.

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[5] Even if eligibility for SUB payments were closely related to hours worked, that fact would not, by itself, render them compensation rather than seniority rights. We emphasized in Alabama Power that it is the nature of the benefit, not the formula by which it is calculated, that is the crucial factor, for "[e]ven the most traditional kinds of seniority privileges could be as easily tied to a work requirement as to the more usual criterion of time as an employee." 431 U.S., at 592, 97 S.Ct., at 2008. As we have explained, the specific provisions of the steel industry plan support, rather than contradict, our conclusion that SUB payments are in the nature of a reward for length of service.

The District Court concluded that SUB payments could not be perquisites of seniority for the further reason that the benefits are not proportionate to the length of service. Under the plan, an employee must have a minimum of two years' seniority to be eligible for SUB payments, no employee may accumulate more than 52 units of SUB credits, and the amount of the benefit does not increase with the length of service as would a pension benefit. Thus an employee who has worked continuously for two years will have met the threshold requirement and will also have accumulated 52 units [447 U.S. 204] of credit; (FN11) he is eligible for benefits for the same length of time, and computed according to the same formula, as an employee with 20 years' seniority. (FN12) According to the District Court, the facts that no benefits are available to employees whose seniority is less than two years and that after 52 credits have been accumulated additional *2109. seniority does not lead to increased benefits were evidence that the benefit is not a reward for longevity of service. (FN13)

[6] [447 U.S. 205] A benefit need not be meticulously proportioned to longevity of service to constitute a perquisite of seniority, however, as long as it performs a function akin to traditional forms of seniority. In fact, the very factors the District Court cited to show that SUB's are not forms of seniority benefits are equally relevant to demonstrate that they are not compensation for services rendered. An employee receives no benefits if he has worked for fewer than two years when he is laid off or if he voluntarily terminates his employment. Such a threshold requirement is more characteristic of seniority provisions than of compensation; in fact, other seniority benefits of the collective-bargaining agreement between Republic and the Steelworkers are also available only to employees with two years' seniority. (FN14) Similarly, an employee cannot accumulate more than 52 credits at a time; any work performed after that ceiling is reached goes "uncompensated." Moreover, the amount of the benefit payment is determined by four factors, none of which appears designed to compensate for hours actually worked: the wage rate at the time of layoff (not at the time the credits were earned); the number of dependents of the employee; the amount of state unemployment compensation received; and the financial position of the benefit fund.

IV

[7] We conclude that the purpose and function of the steel industry SUB plan is to provide economic security during periods of layoff to employees who have been in the service of the employer for a significant period. Thus the benefits are in the nature of a reward for length of service, and do not represent deferred short-term compensation for services actually rendered. Accordingly, SUB payments are perquisites [447 U.S. 206] of seniority to which returning veterans are entitled under the Act. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

FN1. Republic erroneously credited Coffy with approximately nine SUB credits for his 1968 employment. The plan provides that accumulated SUB credits are canceled if an employee quits work voluntarily, as petitioner did after his layoff in 1968. The overpayment was recovered through deductions from petitioner's paycheck after he returned to work.

FN2. The complaint alleged a violation of Sec. 9 of the Military Selective Service Act of 1967, 50 U.S.C. App. Sec. 459 (1970 ed.). The provisions of that statute relating to veterans' re-employment rights were re-enacted without substantive change in Title IV of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. Sec. 2021 et seq.

FN3. The Third and Seventh Circuits have held that SUB payments are perquisites of seniority to which

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a returning veteran is entitled under the Act. Hoffman v. Bethlehem Steel Corp., 477 F.2d 860 (CA3 1973); Akers v. General Motors Corp., 501 F.2d 1042 (CA7 1974). Approximately 1,947,400 workers are covered by collective-bargaining agreements that provide supplemental unemployment benefits. See U.S. Dept. of Labor, Bureau of Labor Statistics, Dept. of Labor, Bull. No. 2065, Characteristics of Major Collective Bargaining Agreements 101 (Apr. 1980).

FN4. Title 38 U.S.C. Sec. 2021 provides in relevant part:

"(a) In the case of any person who is inducted into the Armed Forces of the United States . . . and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service . . .

* * *

"(B) if such position was in the employ of a . . . private employer, such person shall--

"(i) if still qualified to perform the duties of such position, be restored by such employer . . . to such position or to a position of like seniority, status, and pay[,]

*2109 * * *

"unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. . . .

"(b)(1) Any person who is restored to or employed in a position in accordance with the provisions of . . . this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

"(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with . . . this section should be so restored or reemployed in such manner as to give such person such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment."

FN5. The Selective Training and Service Act of 1940, ch. 720, Sec. 8(b), 54 Stat. 890, later re-enacted as the Military Selective Service Act of 1967, 50 U.S.C. App. Sec. 459 (1970 ed.), and subsequently re-enacted as 38 U.S.C. Sec. 2021 et seq. See n. 2, supra.

FN6. An employee having two years of continuous service is eligible for a "short week benefit" for any week in which some, but fewer than 32, hours are worked.

FN7. Certain categories of employees accrue and exhaust credits at a slightly different rate, see Secs. 2.1 and 4.10 of the plan, App. 20, 27, but that distinction is not significant for purposes of this analysis.

FN8. Coffy received credit for his time in the military in computing his period of continuous service to determine his eligibility to receive benefits. We find no inconsistency in the company's action in counting his military service time toward eligibility to receive benefits, but not toward the number of credits he had accumulated. The plain intent of Sec. 7.2 is that during their period of military service, employees shall neither receive benefits nor accrue credits, but that military service shall not be considered a break in continuous service.

FN9. The District Court's view that the benefits were intended to be correlated to work actually performed is supported by the testimony of James Carney, an attorney for United States Steel Corp. He stated that the reason for the 1962 change was that there was no need to keep track of the actual hours worked since it was rare for anyone to work fewer than 32 hours a week. This testimony was contradicted, to some extent, by that of Joseph Senturia, a consultant to the Steelworkers. He

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testified that the change was adopted to liberalize the accrual of credit units and as part of a general simplification of SUB plans in use in the steel industry. In fact, by 1962 SUB plans in all industries provided for accumulation of credit in any week in which any work was performed or any pay received. See J. Becker, Guaranteed Income for the Unemployed: The Story of SUB 125 (1968).

FN10. Employees having two years of continuous service are eligible for a "short week benefit" for any week in which they work some, but fewer than 32, hours. Roughly speaking, the employee is paid at his regular hourly rate for the difference between 32 hours and the number of hours worked. The amount of the benefit is computed by taking the amount by which 32 hours exceeds the sum of the hours worked, paid, not worked for reasons other than lack of work, lost because of labor problems involving the company or transportation or utility companies, or not worked because the employee quit or was suspended or discharged, and multiplying that number by the employee's regular hourly wage rate. One-half credit unit is canceled for every week in which the employee receives short-week benefits. Since the employee also receives one-half credit because he worked some hours in the week, the net effect is that his accumulated credits remain the same.

The other reasons for the 32-hour custom which were cited in the testimony included the nature of steel manufacturing operations, which must be conducted on a 24-hour basis; Art. 6, Sec. 6, of the collective-bargaining agreement, which provides that any employee who reports for work must be given at least 4 hours' work; and Art. 10, Sec. 7, of the agreement, which requires management to consult with the union on the distribution of work if a decrease in the amount of work available results in an average workweek of 32 hours or fewer.

*2109_ FN11. The 2-year continuous service requirement and the 52-credit maximum accumulation are not coextensive. For example, an employee who is laid off before he has been with the company for two years continues to compute his period of continuous service from his original hire date, but does not accumulate credit units during the time he is laid off. Similarly, Sec. 2.4 of the plan permits the employer to cancel the credit units of an employee who willfully falsifies or withholds information on which his weekly benefit is based; such cancellation would not affect the length of the employee's continuous service.

FN12. Of course, since a more senior employee's wage rate is likely to reflect his longer service with the company, a senior employee often will receive a higher SUB payment than will a junior employee.

Modifications to the steel industry SUB program adopted in 1977 have increased the differentiation between less senior employees and those with greater seniority. Benefit payments for employees with 20 or more years of service will no longer be reduced because of the financial position of the fund, and the maximum number of credits that may be accumulated has been doubled, to 104. See A. Freedman, Security Bargains Reconsidered: SUB, Severance Pay, Guaranteed Work 22 (The Conference Board 1978).

FN13. Respondent argues that in fact the SUB plan provides benefits in an inverse relationship to seniority. Respondent observes that, because seniority protects against layoff, the most senior employees are the least likely to receive SUB's, and by the time very senior employees are laid off their benefit payments may be reduced in amount pursuant to Sec. 1.5 of the plan because the fund has been depleted by prior payments to less senior employees. This argument ignores that particular components of a seniority program need not invariably provide greater benefits to more senior workers. "Bumping" provisions, for example, may seldom be used by very senior employees, and yet they are unquestionably rights of seniority. In any event, the record contains no evidence of the funding history of the steel industry SUB program that would permit us to draw any conclusion as to the probability of benefit payments being reduced pursuant to Sec. 1.5.

FN14. For example, an employee with two years' seniority who is laid off may exercise "bumping" rights over less senior employees in the seniority pool, or may transfer to another plant with priority over other applicants, including recently hired employees of the other plant.

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*2002 431 U.S. 581, 95 L.R.R.M. (BNA) 2569,
52 L.Ed.2d 595,
81 Lab.Cas. P 13,255,
1 Employee Benefits Cas. 1158

ALABAMA POWER COMPANY, Petitioner,
v.
Raymond E. DAVIS.

No. 76-451.
Argued April 25, 1977.
Decided June 6, 1977.

Retired employee brought an action against employer to obtain credit from employer with respect to pension plan for the time employee spent in military service after completion of which employee returned to his former employment. The United States District Court for the Northern District of Alabama, 383 F.Supp. 880, rendered a judgment for retired employee and the employer appealed. The United States Court of Appeals for the Fifth Circuit, 542 F.2d 650, affirmed and certiorari was granted. The Supreme Court, Mr. Justice Marshall, held that: (1) under statute relating to rehiring of returning veterans, benefit is a right of seniority secured to veteran if it would have accrued with reasonable certainty, and (2) since reasonable certainty requirement was made on basis of employee's work history both before and after military service and nature of pension payments was reward for length of service, employee was entitled to credit on pension plan for period of military service.

Affirmed.

1. ARMED SERVICES k118(4)
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k118 Position Restorable
34k118(4) Seniority.

U.S.Ala., 1977.

Under statute relating to reemployment of veterans, if benefit would have accrued, with reasonable certainty, had veteran been continuously employed by private employer and if it is in the nature of a reward for service, it is a perquisite of seniority to which veteran is entitled, but if veteran's right to benefit at time he entered military service was subject to significant contingency, or if benefit is in the nature of short-term compensation for services rendered, it is not an aspect of seniority within coverage of statute. Military Selective Service Act, Secs. 9, 9(b, d), 50 U.S.C.A. App. Secs. 459, 459(b, d).

2. ARMED SERVICES k118(3)
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k118 Position Restorable
34k118(3) Compensation.

U.S.Ala., 1977.

Where retired employee's work history both before and after military service met the reasonable certainty requirement and it appeared that the true nature of the employee's pension payments constituted a reward for length of service, employee who left employment for military service but returned and continued in employment until retirement was entitled, under statute, to credit toward his pension for his period of military service. Military Selective Service Act, Secs. 9, 9(b, d), 50 U.S.C.A. App. Secs. 459, 459(b, d).

3. ARMED SERVICES k118(3)
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k118 Position Restorable
34k118(3) Compensation.

U.S.Ala., 1977.

Statute relating to rehiring a returning veteran without loss of security does not grant veteran's right to compensation for work that they have not performed. Military Selective Service Act, Secs. 9, 9(b, d), 50 U.S.C.A. App. Secs. 459, 459(b, d).

2003 Syllabus (FN)

Respondent, who left employment with petitioner for military service but who returned after completion of such service and continued in employment until his retirement, held entitled under s 9 of the Military Selective Service Act, which requires an employer to rehire a returning veteran without loss of seniority, to credit toward his pension under petitioner's pension plan for his period of military service. Pp. 2004-2010.

(a) A benefit is a right of seniority secured to a veteran by s 9 if it would have accrued with

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reasonable certainty, as opposed to being subject to a significant contingency, had the veteran been continuously employed by the employer, McKinney v. Missouri-K.-T. R. Co., 357 U.S. 265, 78 S.Ct. 1222, 2 L.Ed.2d 1305; Tilton v. Missouri Pac. R. Co., 376 U.S. 169, 84 S.Ct. 595, 11 L.Ed.2d 590, and if it is in the nature of a reward for length of service rather than short-term compensation for services rendered, Accardi v. Pennsylvania R. Co., 383 U.S. 225, 86 S.Ct. 768, 15 L.Ed.2d 717; Foster v. Dravo Corp., 420 U.S. 92, 95 S.Ct. 879, 43 L.Ed.2d 44. Pp. 2005-2007.

(b) Here, not only is the "reasonable certainty" requirement met on the basis of respondent's work history both before and after his military service, but it also appears that the "true nature" of the pension payments is a reward for length of service, especially in view of the lengthy period (20 years or 15 years if age 50) required by the pension plan for pension rights to vest in the employee. Pp. 2008-2010.

(c) Moreover, respondent's claim is supported by the functions of pension plans in assuring financial security for long-term employees and, by providing such security, in encouraging such employees to retire when their efficiency declines. P. 2010.

542 F.2d 650, affirmed.

Allan A. Ryan, Jr., Washington, D. C., for respondent.

H. Hampton Boles, Birmingham, Ala., for petitioner.

[431 U.S. 582] Mr. Justice MARSHALL delivered the opinion of the Court.

Respondent Davis became a permanent employee of petitioner Alabama Power Co. on August 16, 1936, and continued to work until March 18, 1943, when he left to enter the military. After serving in the military for 30 months, he resumed his position with Alabama Power, where he worked until he retired on June 1, 1971. Davis received credit under the company pension plan for his service from August 16, 1937, (FN1) until the date of his retirement, with the exception of the time he spent in the military and some time spent on strike. Davis claimed that s 9 of the Military Selective Service Act of 1967, 50 U.S.C. App. s 459(b), (FN2) requires Alabama Power to give him credit toward his pension for his period of military service. With the assistance of the United States Attorney, (FN3) he sued to vindicate that asserted right. The District Court, 383 F.Supp. 880 (N.D.Ala.1974), and the Court *2004 of Appeals for the Fifth Circuit, 542 F.2d 650 (1976), agreed with Davis. Because of the importance of the issue and a conflict among the Circuits, (FN4) we granted certiorari, 429 U.S. 1037, 97 S.Ct. 731, 50 L.Ed.2d 748. (FN5) We affirm.

[431 U.S. 583] I

The Military Selective Service Act provides the mechanism for manning the Armed Forces of the United States. Section 9 of the Act evidences Congress' desire to minimize the disruption in individuals' lives resulting from the national need for military personnel. It seeks to accomplish this goal by guaranteeing veterans that the jobs they had before they entered the military will be available to them upon their return to civilian life. Specifically, s 9 requires that any qualified person who leaves a permanent position with any employer to enter the military, satisfactorily completes his military service, and applies for re-employment within 90 days of his discharge from the military,

> "be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay . . . unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so." 50 U.S.C. App. s 459(b)(B)(i).

Moreover, any person so restored to a position

> "shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without [431 U.S. 584] cause within one year after such restoration." 50 U.S.C.App. s 459(c)(1).

In our first confrontation with the predecessor of s 9, (FN6) we held that the statutory protection against discharge within a year of re-employment did not protect a veteran from being laid off while nonveterans with greater seniority retained their jobs. Fishgold v. Sullivan Drydock & Repair Corp., 328

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U.S. 275, 66 S.Ct. 1105, 90 L.Ed. 1230 (1946). In reaching this conclusion, we announced two principles that have governed all subsequent interpretations of the re-employment rights of veterans. First, we stated that under the Act:

> "(The veteran) does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." Id., at 284-285, 66 S.Ct., at 1111.

Congress incorporated this doctrine in succeeding re-enactments of the re-employment provision. See 50 U.S.C. App. s 459(c)(2). (FN7) The second guiding principle we identified was:

> "This legislation is to be liberally construed for the benefit of those who left *2005 private life to serve their country in its hour of great need. . . . And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which [431 U.S. 585] Congress has secured the veteran under the Act." 328 U.S., at 285, 66 S.Ct., at 1111.

Our next cases were also concerned with the extent of the protection afforded rights that were clearly within the Act's scope. Trailmobile Co. v. Whirls, 331 U.S. 40, 67 S.Ct. 982, 91 L.Ed. 1328 (1947); Aeronautical Industrial Dist. Lodge 727 v. Campbell, 337 U.S. 521, 69 S.Ct. 1287, 93 L.Ed. 1513 (1949); Oakley v. Louisville & N. R. Co., 338 U.S. 278, 70 S.Ct. 119, 94 L.Ed. 87 (1949). More recently, however, our efforts have been directed at determining whether a particular right claimed by a veteran is an aspect of the "seniority" which the Act protects. We have been unable to rely on either the language or the legislative history of the Act when making these determinations, for neither contains a definition of "seniority."

We first faced this problem in McKinney v. Missouri-K.-T. R. Co., 357 U.S. 265, 78 S.Ct. 1222, 2 L.Ed.2d 1305 (1958). McKinney had been re-employed at a higher level than he had attained when he left for military service, with seniority in his new position dating from his return to work. When his job was abolished, he claimed that his seniority at the higher level should have dated from the time he would have been eligible to reach that level had he not served in the military. This Court rejected his claim because of the contingent nature of his expectation of being promoted from the job he previously held. That promotion, the Court found, depended "not simply on seniority or some other form of automatic progression, but on the exercise of discretion on the part of the employer." Id., at 272, 78 S.Ct., at 1227. Since the promotion would not have come automatically had McKinney continued to ride the seniority escalator, the Court concluded that neither the promotion nor a seniority date calculated as of the time he might have been promoted were incidents of the "seniority" protected by the Act. (FN8)

[431 U.S. 586] Six years later, the Court again considered whether a veteran was entitled to a seniority date calculated as if he had obtained a higher level position while in the military. Tilton v. Missouri Pac. R. Co., 376 U.S. 169, 84 S.Ct. 595, 11 L.Ed.2d 590 (1964). Tilton had been promoted before he left the railroad to enter the military, but he had not worked enough days to complete the probationary period necessary to obtain permanent status and begin accumulating seniority in the higher level job. When he returned to the railroad, he successfully completed the remainder of the probationary period. The company set his seniority date as of the time he actually finished the probationary period; he claimed that the date should have been fixed as of the time he would have satisfied the probationary work requirement had it not been for his military service.

This Court agreed. Unlike the situation in McKinney, we found that the only management discretion involved was the decision to allow Tilton to assume probationary status in the higher level position, and that discretion had been exercised before he entered the military. Tilton's satisfactory completion of the probationary period after he was reinstated by the railroad was sufficient indication that he would have completed that period earlier if his tenure had not been interrupted by his service to his country. The mere possibility that his ride *2006 on the escalator might have been interrupted by some other circumstance could not be allowed to deny him the status he almost certainly would have obtained:

> "In every veteran seniority case the possibility exists that work of the particular type might not have been available [431 U.S. 587] that the veteran would not have worked satisfactorily during the period of his absence; that he might not have elected to accept the higher position; or that sickness might have prevented him from continuing his employment. In light of the

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purpose and history of this statute, however, we cannot assume that Congress intended possibilities of this sort to defeat the veteran's seniority rights." 376 U.S., at 180-181, 84 S.Ct., at 602.

In McKinney and Tilton, the Court decided whether the veterans' promotions were incidents of the "seniority" protected by the Act, but in both cases, the benefit claimed by the veterans earlier seniority dates was clearly "seniority." Our most recent cases have involved claims to benefits that could not be so easily classified. These cases have required us to consider not only the relative certainty of the benefit's accrual but also the nature of the benefit itself.

We first encountered this added complexity in Accardi v. Pennsylvania R. Co., 383 U.S. 225, 86 S.Ct. 768, 15 L.Ed.2d 717 (1966), a case involving a claim to severance pay. The petitioners in Accardi were tugboat firemen who had left their jobs for military service and had later been restored with appropriate seniority credit. When technological change led to the elimination of the position of tugboat fireman, the railroad agreed to provide severance pay, with the amount of the payment dependent on the employee's length of "compensated service." Since Accardi and his colleagues had not received compensation from the company during their military service, the railroad did not give them credit for that time when calculating their severance payments.

This Court ruled in favor of the firemen. It was clear that had the petitioners remained on their jobs, they would have received severance pay credit for the years they spent in the military. Therefore, the reasonable-certainty criterion established in McKinney and Tilton was satisfied. The company [431 U.S. 588] argued, however, that the payment was not based on, and so was not an incident of, seniority, but rather was based on total actual service to the railroad. While questioning the company's argument because of the "bizarre results possible under the definition of 'compensated service,' " 383 U.S., at 230, 86 S.Ct., at 771, (FN9) we rejected it because the "real nature" of the payments was compensation for the lose rights and expectations that accrued as the employees' longevity on the job increased. Ibid. That nature could not be disguised by use of a "compensated service" formula to calculate the amount of the payments. Accordingly, we concluded that

"the amount of these allowances is just as much a perquisite of seniority as the more traditional benefits such as work preference and order of lay-off and recall." Ibid.

Failing to credit the veterans with their military service time when calculating their payments therefore violated the Act's requirement that they be reinstated without loss of seniority. (FN10)

Most recently, in Foster v. Dravo Corp., 420 U.S. 92, 95 S.Ct. 879, 43 L.Ed.2d 44 *2007 (1975), we dealt with another claim for payment because of time spent in military service. Foster had worked for his private employer for seven weeks in 1967, spent 18 months in the military, and returned to work for the last 13 weeks of 1968. He claimed that he was entitled to vacation pay for both [431 U.S. 589] years, although the collective-bargaining agreement granted full vacation benefits only for 25 weeks of work in a calendar year.

Again focusing on the nature of the benefit at issue, we rejected Foster's claim. Vacation benefits, we held, are "intended as a form of short-term compensation for work performed," id., at 100, 95 S.Ct., at 854, not as a reward for longevity with an employer. (FN11) In reaching this conclusion, we noted the work requirement imposed by the collective-bargaining contract, the proportionate increase in vacation benefits that resulted from overtime work, and the availability of pro rata benefits if an employee was laid off before he had worked the required number of weeks. These facts, however, were sufficient only to "lend substantial support," ibid., to the employer's argument that the vacation benefits were a form of pay for work done. The nature of the benefits "the common conception of a vacation as a reward for and respite from a lengthy period of labor," id., at 101, 95 S.Ct., at 884 was decisive.

[1] (1) Thus, our cases have identified two axes of analysis for determining whether a benefit is a right of seniority secured to a veteran by s 9. If the benefit would have accrued, with reasonable certainty, had the veteran been continuously employed by the private employer, and if it is in the nature of a reward for length of service, it is a "perquisite of seniority." If, on the other hand, the veteran's right to the benefit at the time he entered the military was subject to a significant contingency, or if the benefit is in the nature of short-term compensation for services rendered, it is not an aspect of seniority within the coverage of s 9. We evaluate respondent Davis' right to pension credit for his years in the military in light of these principles.

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[431 U.S. 590] II

[2] (2) Alabama Power established its pension plan on July 1, 1944, during the time Davis was in the military. The plan, which is funded entirely by the company, covers all "full-time regular employee(s)" who have completed one year of continuous service with the company and are at least 25 years old. App. 58-59. Under the labor agreements and practices of the company, a full-time regular employee is one who, with limited exceptions, (FN12) works a 40-hour week. A covered employee has no vested right to any benefit from the plan until he had completed 20 years of service, which for this purpose includes time spent in the military, or has completed 15 years of service and attained the age of 50. Id., at 90-91. (FN13) Normal retirement age under the plan is 65, but an employee with 20 years of "accredited service" can elect to retire any time after he has reached the age of 55. App. to Pet. for Cert. 43a-44a. Davis chose the early retirement option.

*2008 The concept of "accredited service" is a major determinant of the amount of benefits paid and is the source of the present controversy. The plan defines "accredited service" as the period of "future service" together with the period of "past service." Id., at 34a-35a. These terms, in turn, are defined as an employee's period of service after the initiation of the pension plan and his inclusion within it (future service) and his period of service prior to that date (past service). Id., at [431 U.S. 591] 35a. Future service is credited to an employee "for service rendered to the Company" as a full-time, regular employee and for periods of authorized leave of absence with pay. Employees on leave of absence without regular pay, and persons serving in the military, are not credited with future service during their absence from the company. Id., at 40a. (FN14) Retirement benefits are calculated by the use of formulas in which years of accredited service are multiplied by an earnings factor. (FN15) Had Davis received accredited service for the time he spent in the military, his monthly pension payment would have been $216.06 rather than the $198.95 to which the company said he was entitled.

It is clear that the reasonable-certainty requirement of McKinney and Tilton is satisfied in this case. Respondent's work history both before and after his military tour of duty demonstrates that if he had not entered the military, he would almost certainly have accumulated accredited service for the period between March 18, 1943, and October 8, 1945. Unpredictable occurrences might have intervened, but "we cannot [431 U.S. 592] assume that Congress intended possibilities of this sort to defeat the veteran's seniority rights." Tilton v. Missouri Pac. R. Co., 376 U.S., at 181, 84 S.Ct., at 602.

[3] (3) Alabama Power contends, however, that pension payments should be viewed as compensation for service rendered like the vacation payments in Foster, rather than as a perquisite of seniority like the severance payments in Accardi. The company argues that the definition of accredited service in terms of full-time service to the company is a bona fide, substantial work requirement which, under Foster, "is strong evidence that the benefit in question was intended as a form of compensation." 420 U.S., at 99, 95 S.Ct., at 884. Since s 9 does not grant veterans the right to compensation for work they have not performed, Alabama Power concludes that Davis is not entitled to his claimed pension increase.

As we noted in our discussion of Foster, that case turned on the nature of vacation benefits, not on the particular formula by which those benefits were calculated. Even the most traditional kinds of seniority privileges could be as easily tied to a work requirement as to the more usual criterion of time as an employee. Yet, as we held in Fishgold, "no practice of employers . . . can cut down the service adjustment benefits which Congress has secured the veteran under the Act." 328 U.S., at 285, 66 S.Ct., at 1111. We must look beyond the overly simplistic analysis suggested by Alabama Power to the nature of the payments.

*2009 It is obvious that pension payments have some resemblance to compensation for work performed. Funding a pension program is a current cost of employing potential pension recipients, as are wages. The size of pension benefits is a subject of collective bargaining, (FN16) and future benefits may be [431 U.S. 593] traded off against current compensation. (FN17) The same observations, however, can be made about any benefit and therefore are of little assistance in determining whether a particular benefit recompenses labor or rewards longevity with an employer.

Other aspects of pension plans like the one established by petitioner (FN18) suggest that the "true nature" of the pension payment is a reward for length of service. The most significant factor pointing to this conclusion is the lengthy period required for pension rights to vest in the employee. It is difficult to

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maintain that a pension increment is deferred compensation for a year of actual service when it is only the passage of years in the same company's employ, and not the service rendered, that entitles the employee to that increment. [431 U.S. 594] Moreover, because of the vesting requirement and the use of payment formulas that depend on earnings at the time of retirement, both the cost to the employer and the payment to the employee for each year of service depend directly on the length of time the employee continues to work for that employer. Periodic adjustments of the benefit formulas to account for unanticipated increases in living costs, see App. 74-84, emphasize the dissociation of payment levels from the work that Alabama Power claims the payments compensate.

The function of pension plans in the employment system also supports respondent's claim. A pension plan assures employees that by devoting a large portion of their working years to a single employer, they will achieve some financial security in their years of retirement. By rewarding lengthy service, a plan may reduce employee turnover and training costs and help an employer secure the benefits of a stable work force. See D. McGill, Fundamentals of Private Pensions 21-23 (3d ed. 1975). In addition, by providing economic security in retirement, pension plans encourage longtime employees whose working efficiency may be on the decline to retire and make way for younger workers. Id., at 21-22; S. Slichter, J. Healy, & E. Livernash, The Impact of Collective Bargaining on Management 374 (1960). The relationship between pension payments and passage of time as an employee is central to both of these functions.

*2010. We conclude, therefore, that pension payments are predominantly rewards for continuous employment with the same employer. Protecting veterans from the loss of such rewards when the break in their employment resulted from their response to the country's military needs is the purpose of s 9. That purpose is fulfilled in this case by requiring Alabama Power to pay Davis the pension to which he would have been entitled by virtue of his lengthy service if he had not been called to the colors. Accordingly, the judgment below is affirmed.

It is so ordered.

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

FN1. Employees do not become eligible to participate in the plan until they have worked for one year. See infra, at 2008.

FN2. Section 459(b) has been recodified, without substantial change, as 38 U.S.C. s 2021 (1970 ed., Supp. V).

FN3. See 50 U.S.C. App. s 459(d), now codified at 38 U.S.C. s 2022 (1970 ed., Supp. V).

FN4. Compare Jackson v. Beech Aircraft Corp., 517 F.2d 1322 (CA10 1975) and Litwicki v. Pittsburgh Plate Glass Industries, Inc., 505 F.2d 189 (CA3 1974) (denying pension credit), with Smith v. Industrial Employers & Distributors Assn., 546 F.2d 314 (CA9 1976) (granting past service credit and denying future service credit).

FN5. The grant of certiorari was limited to the first question presented, excluding the issue of the applicability of the Alabama statute of limitations.

FN6. The Selective Training and Service Act of 1940, c. 720, s 8(b), 54 Stat. 890.

FN7. "It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

This provision is now codified at 38 U.S.C. s 2021(b)(2) (1970 ed., Supp. V).

FN8. "(Section) 9(c) does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been his if he had not been called to the colors. Much there is that might have flowed from experience, effort, or chance to which he cannot lay claim under the statute. Section 9(c) does not assure him that the past with all its possibilities of betterment will be recalled. Its very important but limited purpose is to assure that those changes and advancements in status that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in the military

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service." 357 U.S., at 271-272, 78 S.Ct., at 1226.

FN9. It was possible for an employee to receive credit for a full year of "compensated service" by working only seven well-timed days during the year. The company defined a month of "compensated service" as any month during which the employee worked one or more days, and a year of "compensated service" was defined as 12 such months, or a major portion thereof.

FN10. The Court also held that whatever the full scope of the statutory language governing "other benefits" contained in s 459(c), see supra, 2004-2005, that language was intended to add to the protections afforded the veteran's seniority rights, not to lessen those protections. 383 U.S., at 231-232, 86 S.Ct., at 772-773. The Court's conclusion that the severance payments were perquisites of seniority therefore made unnecessary consideration of the "other benefits" provision.

FN11. Under the collective-bargaining agreement in Foster, the length of an employee's vacation increased with his length of continuous employment with the firm. The company conceded that the employee's time in military service had to be counted in determining the length of his vacation. 420 U.S., at 101 n. 9, 95 S.Ct., at 885.

FN12. The established exceptions include annual vacations, paid holidays, 10 days of annual sick leave, which may be accumulated up to a maximum of 30 days, and up to three days' leave in case of a death in the employee's immediate family. In addition, longtime employees may be allowed up to nine months of extended sick leave.

FN13. The Employee Retirement Income Security Act of 1974, s 203, 88 Stat. 854, 29 U.S.C. s 1053 (1970 ed., Supp. V), establishes vesting requirements more favorable to employees than those described in the text. This law, which generally requires vesting within 10 to 15 years, did not affect respondent and, insofar as is relevant to the question presented in this case, does not alter the nature of pension plans.

*2010 FN14. A limited exception to this rule, see App. 61-62, was not applicable to Davis.

FN15. Davis' pension payment is calculated under s V4(b)(ii) of the plan. That section provides:

"The minimum Retirement Income payable after January 1, 1966 to an employee included in the Plan retiring from the service of the Company after January 1, 1966 at his Early Retirement Date (before adjustment for Provisional Payee designation, if any) shall be an amount equal to 1% of his monthly earnings on his Early Retirement Date multiplied by his years of Accredited Service, reduced by (specified amounts)." App. 70.

"Normal retirement income" under the plan is calculated by reference to specified percentages of an employee's earnings, exclusive of overtime during his years with the company. Id., at 65-68, 73. The amount to which an employee would be entitled under the "normal retirement income" formula has, however, been periodically adjusted upward by formulas which, like the formula applicable to Davis, call for multiplication of a percentage of recent earnings by the number of years of accredited service. See id., at 74-84.

FN16. Inland Steel Co. v. NLRB, 170 F.2d 247 (CA7 1948), cert. denied on this issue, 336 U.S. 960, 69 S.Ct. 887, 93 L.Ed. 1112 (1949), aff'd on other grounds, American Communications Ass'n C.I.O. v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925 (1950). The company contends that Inland Steel holds that pensions are "wages" and that they must therefore be classified as "other benefits," see n. 10 supra, under the Military Selective Service Act. Inland Steel concluded, however, only that pensions are a mandatory subject of collective bargaining under the National Labor Relations Act (NLRA) because they are either wages "or other conditions of employment." 170 F.2d at 249-255. Even if pensions are "wages" for the purposes of the NLRA, that classification would not control their treatment under the very different statute at issue in this case. Cf. United States v. Embassy Restaurant, 359 U.S. 29, 33, 79 S.Ct. 554, 556, 3 L.Ed.2d 601 (1959) (payments to union welfare fund may be "wages" under NLRA but not under Bankruptcy Act).

FN17. Cf. S. Slichter, J. Healy, & E. Livernash, The Impact of Collective Bargaining on Management 373 (1960) (pension plans encouraged during World War II by difficulty of obtaining general wage increases).

FN18. Petitioner's plan is a "defined benefit" plan, under which the benefits to be received by

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employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits. The other basic type of pension is a "defined contribution" plan, under which the employer's contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide. See 29 U.S.C. ss 1002(34), (35) (1970 ed., Supp. V); Note, Fiduciary Standards and the Prudent Man Rule Under the Employee Retirement Income Security Act of 1974, 88 Harv.L.Rev. 960, 961-963 (1975). We intimate no views on whether defined contribution plans are to be treated differently from defined benefit plans under the Military Selective Service Act.

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*1245 129 L.R.R.M. (BNA) 2679, 57 USLW 2304, 110 Lab.Cas. P 10,770

Richard R. BURKART, Plaintiff-Appellant,
v.
POST-BROWNING, INC., Defendant-Appellee.

No. 87-3403.
United States Court of Appeals,
Sixth Circuit.
Submitted May 13, 1988.
Decided Oct. 20, 1988.

Former employee sued employer for damages for unlawful termination under the Vietnam Era Veterans' Readjustment Assistance Act. Employer's motion for summary judgment was granted by the United States District Court for the Southern District of Ohio, V. Aug, United States Magistrate, and former employee appealed. The Court of Appeals, Engel, Chief Judge, held that the Act allowed employer to terminate employee for "cause" when employee deliberately disregarded the needs of employer by giving only 15 minutes notice prior to imminent three-week leave for additional duty as National Guardsman, particularly when such short notice could easily have been avoided.

Affirmed.

1. ARMED SERVICES k115(7)
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k115 Veterans Entitled
34k115(7) Leaving position for training or service.

C.A.6 (Ohio) 1988.

The Vietnam Era Veterans' Readjustment Assistance Act requires adequate notice to employer to invoke employer's obligation, upon request, to grant leave of absence to reservist to perform active duty for training or inactive duty training. 38 U.S.C.A. Secs. 2021(b)(1), 2024(d).

2. ARMED SERVICES k120
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k120 Discharge.

C.A.6 (Ohio) 1988.

The Vietnam Era Veterans' Readjustment Assistance Act allowed employer to terminate reservist for "cause" when the reservist deliberately disregarded the needs of the employer by giving only 15 minutes notice prior to an imminent three-week leave for additional duty, particularly when such short notice could easily have been avoided; reservist's distrust of his supervisor was no justification for his failure to earlier notify any of his other superiors of his decision to seek leave. 38 U.S.C.A. Secs. 2021 (b)(1), 2024(d).

3. ARMED SERVICES k122(1)
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k122 Actions or Proceedings for Enforcement
34k122(1) In general.

C.A.6 (Ohio) 1988.

Whether reservist has given employer adequate notice of request for leave for additional duty under the Vietnam Era Veterans' Readjustment Assistance Act is a mixed question of law and fact. 38 U.S.C.A. Sec. 2024(d).

*1246 Richard Burkart, Hamilton, Ohio, pro se.

Jay Hill, Swain & Hardin, Cincinnati, for defendant-appellee.

Before ENGEL, Chief Judge, and KEITH and RYAN, Circuit Judges.

ENGEL, Chief Judge.

Plaintiff Richard Burkart appeals a summary judgment of the district court in favor of defendant Post-Browning in Burkart's suit for damages for unlawful termination of his employment brought pursuant to section 404(a) of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. Sec. 2021(a). After a review of the record and careful consideration of the applicable provisions of the Veteran's Act, we affirm the court's finding that Burkart's notice to his employer of pending voluntary leave was inadequate and that he was not discharged in violation of that Act.

I.

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In 1983 Burkart was an employee of Post-Browning. During his employment, he also served as a National Guardsman. While on National Guard duty for two weeks in June, Burkart was offered the opportunity to volunteer for additional duty to commence on July 9, 1983. Although he returned to work July 5 with the hope of accepting the volunteer position, he did not formally notify the military unit that he would be attending the camp until July 7 and did not notify his employer until 4:45 p.m. the following day on Friday, July 8. This delayed notice gave the employer only fifteen minutes to prepare for Burkart's pending three week absence. Based largely on his inadequate notice, Post-Browning terminated Burkart. Burkart was notified of his termination upon his return to work three weeks later, on August 1.

Burkart first filed a complaint in the Butler City Common Pleas Court seeking unemployment benefits for the period following his termination from Post-Browning. His claim was denied based on his failure to comply with Ohio Rev.Code Ann. Sec. 5903.061, which requires employees to provide their employers with at least sixty days notice before taking leave. Burkart did not appeal this judgment, but subsequently filed a complaint with the United *1247 States District Court for the Southern District of Ohio alleging that he was unlawfully discharged under 38 U.S.C. Sec. 2021(a) of the Vietnam Era Veterans' Readjustment Assistance Act. The magistrate, hearing the case with the consent of both parties, granted Post-Browning's motion for summary judgment. The primary issues raised on appeal concern whether inadequate notice of pending duty is a valid basis for discharge of a member of the reserve armed forces and, if so, whether Burkart's notice was inadequate.

II.

In passing section 404(a) of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. Sec. 2021 et seq., Congress spoke at great length about its desire to protect the reservist from prejudice resulting from his periodic duty. This congressional intent is evident in the plain language of the statute: "Any person who seeks or holds a position [with the reserve Armed Forces] ... shall not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces." 38 U.S.C. Sec. 2021(b)(3). The Supreme Court has also recognized this legislative purpose: "The legislative history ... indicates that Sec. 2021(b)(3) was enacted for the significant but limited purpose of protecting the employee-reservist against discriminations like discharge and demotion, motivated solely by reserve status." Monroe v. Standard Oil Co., 452 U.S. 549, 559, 101 S.Ct. 2510, 2516, 69 L.Ed.2d 226 (1981).

[1] Despite Congress' clear intent to protect reservists from unnecessary discrimination arising from military duties, however, nothing in the legislative history or the case law indicates that a reservist is to be immunized indiscriminately from all responsibility to his employer. Section 2024(d), for example, requires that a reservist give at least some notice to the employer before going on military duty: "Any employee [in the reserve component of the Armed Forces] ... shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States" (emphasis added). Although this statutory provision makes no mention of the required adequacy of the notice, it is apparent from the language of the statute that at least some notice by the serviceman is implicit in its command that leave be given "upon request." (FN1) The necessity of giving notice has been recognized by other courts as well. For example, in Blackmon v. Observer Transportation Co., 102 Lab.Cas. (CCH) p 11,450 at 23,913 (W.D.N.C., Oct. 28, 1982) [available on WESTLAW, 1982 WL 805], the court found that the "[p]laintiff was discharged not because of his military service and obligations, but because of his failure to request a leave of absence from his employer, a statutory requirement which must be met to entitle an employee to the reinstatement rights afforded by the statute."

On appeal, Burkart appears to recognize this requirement that some notice be given, but nevertheless argues that the absence of any statutory language defining the adequacy of such notice compels the conclusion that any notice, however momentary, is adequate. If section 2024(d) were viewed in isolation from the remainder of the Veteran's Act, we might be tempted to join in Burkart's reading of section 2024(d). However, other provisions of that same statute make it clear that a reservist is not immune from termination. Section 2021(b)(1) provides employers with the discretion to terminate an employee for cause: "Any person who is restored to or employed in a position [with a private employer] ... shall not be discharged from such *1248 position without cause within one year after

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such restoration or reemployment." 38 U.S.C. Sec. 2021(b)(1) (emphasis added). In Carter v. United States, 407 F.2d 1238 (D.C.Cir.1968), the D.C. Circuit provided a thorough analysis of section 2021(b)(1): "We think a discharge may be upheld as one for 'cause' only if it meets two criteria of reasonableness: one, that it is reasonable to discharge employees because of certain conduct, and the other, that the employee had fair notice, express or fairly implied, that such conduct would be ground for discharge." Id. at 1244. More recently, in Anthony v. Basic American Foods, Inc., 600 F.Supp. 352, 355 (N.D.Cal.1984), the district court for the Northern District of California set forth slightly different factors in considering the more specific question of whether a notice is adequate: "[T]he plaintiff's leave request should be evaluated according to whether it was reasonable both in light of 1) the circumstances giving rise to the request and 2) the requirements of the employer."

[2] Under either set of factors, however, we read section 2021(b)(1) as allowing an employer to terminate a reservist for "cause" when, as found here, the reservist deliberately disregards the needs of the employer by giving only fifteen minutes notice prior to an imminent three-week leave, particularly when such short notice could easily have been avoided. As the district court stated in McCormick v. Carnett-Partsnett Systems, Inc., 396 F.Supp. 251 (M.D.Fla.1975):

> This was certainly not a case of discrimination against a veteran for exercising his legal rights, nor of a company trying to do indirectly what it could not do directly. Plaintiff seems to have assumed that the right to reinstatement is a guarantee that any behavior on the job must be tolerated. This is obviously not the case; the protection of the statute is based upon the veteran's compliance with the reasonable and ordinarily accepted standards of personal conduct and performance of duty of all employees.

Id. at 256 (citations omitted). In such a case it is not the employee's ties with the armed services which led to his discharge. Rather, the cause of the employee's discharge is his own intentional failure to act responsibly in reporting and informing the employer of his future obligations, regardless of whether these obligations were related to military duty or some other personal need. "If a non-reserve employee in [the employee's] position would be terminated for the same conduct, [the employee's] reserve status cannot insulate him. If, on the other hand, a non-reserve employee would not be terminated for the same conduct, it becomes obvious that the reasons given for termination were pretextual." Sawyer v. Swift & Co., 836 F.2d 1257, 1261 (10th Cir.1988). Burkart's reckless behavior in failing to notify Post-Browning of his pending military leave is thus the direct cause of his subsequent termination, having no relation to the fact that he chose to take the leave.

With regard to the judicially created requirement that the employer give sufficient notice of termination to a reservist, the court in Carter specifically withheld requiring that the notice be express:

> The ultimate issue here, which is interwoven with such questions of fact, is whether the conduct was or should have been known to the employee to be prohibited by the employer.
>
> That knowledge may, of course, rest on fair implication, even though not made express, as in the kind of job-related misbehavior that is inconsistent with proper attention to work or proper loyalty to the employment relationship.

Carter, 407 F.2d at 1246 (footnotes omitted). In the context of the record here, fifteen minutes notice of a three week leave was so blatantly detrimental to his employer that Burkart had to know it would trigger his employer's subsequent decision to demote or even to terminate him. By his own testimony Burkart himself plainly recognized the inevitability of his discharge. As he stated in his deposition: "After I told them about the opportunity of going to the other camp, I told them that maybe they should go ahead and lay me off.... I felt that with the two big incidents in mind that this was the way *1249 that the company was going to operate, you know, that this was their opportunity to get rid of me if they so choose [sic]."

Our conclusion here is further supported by the decisions of other courts. The Fifth Circuit has stated:

> Congress, in amending the Act, intended to prevent discrimination in employment as a result of a reservist's military obligation but it did not intend thereby to endow a reservist with unreasonable powers over his employer or cause his employer unreasonable hardship. The training period for which leave of absence is given must be

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reasonable both in the context of the reservist's military obligation and the requirements of the employer.

Lee v. City of Pensacola, 634 F.2d 886, 888 (5th Cir.1981). Although the analysis of some courts is somewhat different insofar as they base their findings of inadequate notice under section 2024(d), see Sawyer, 836 F.2d at 1260 & n. 2 (and cases cited therein), our ultimate conclusion that adequate notice is required under the Veterans' Act is identical.

[3] It is further disputed whether a finding of inadequate notice is a conclusion of law or a finding of fact. As the previous analysis demonstrates, the statute and legislative history provide no guidance for this inquiry since there are no statutory criteria defining what constitutes "adequate" notice. In the absence of statutory standards, "adequate notice" becomes a judicially created basis for "cause" under section 2021(b)(1), and we must turn to our circuit's law on the more general question whether the adequacy of notice is a question of law or fact.

Although the district court indicated that its determination of the adequacy of Burkart's notice was a conclusion of law, we do not find support for this position in our court's past consideration of the question. The case law indicates that adequacy of notice is consistently regarded as a finding of mixed fact and law. (FN2) As a panel of our court stated in K & M Joint Venture v. Smith International, Inc., 669 F.2d 1106, 1111-12 (6th Cir.1982), "We agree that the question of whether any notice was given, and if so, what the notice consisted of and when it was given, is one of fact. However, the question of whether the notice satisfied the statutory requirement is one of law. Thus, the issue of notice in this case presents a mixed question of fact and law."

The standard for summary judgment for questions of mixed fact and law is identical to that for findings of fact. Thus, summary judgment may not be granted unless there are no remaining material facts in dispute when the evidence is construed most favorably to the nonmoving party. Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1232 (6th Cir.1981); Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1146 & n. 7 (6th Cir.1975). Additionally, on appeal a "de novo" review is required both of a district court's grant of summary judgment and of a district court's findings of mixed law and fact, even when these findings are not made on a summary judgment motion. Cordovan Associates, Inc. v. Dayton Rubber Co., 290 F.2d 858, 860 (6th Cir.1961); see also United States v. Weingarden, 473 F.2d 454, 460-61 (6th Cir.1973).

*1250 Upon our careful review of the record and in the context of the undisputed facts before the trial judge, it is apparent to us that no reasonable fact finder could conclude other than that Burkart deliberately knew his notice was too short and would be so viewed by his employer, and that Burkart thereby sought to trigger his own discharge so that he could not only go on military duty but also return, not to his job, but to unemployment compensation. The facts leading to Burkart's discharge are not in dispute. It is uncontested that at some time between June 9 and July 3, 1983, Burkart was extended an offer to attend an additional voluntary three-week camp to be held from July 9 through July 30, 1983; that Burkart attempted to set up a meeting regarding his additional duty with Post following his return on July 5, 1983, but was unable to get an appointment until Friday, July 8 at 4:30; that Burkart could have given notice of his intention to take additional leave to his supervisor but instead insisted upon waiting to discuss the matter with Post because he allegedly did not trust his supervisor; that Burkart accepted the voluntary assignment on Thursday, July 7, although he had not yet discussed the matter with any of his superiors at Post-Browning; and that upon Burkart's return on August 1 he was notified that his employment with the defendant was terminated. The only preliminary fact arguably in dispute, the quality of Burkart's work prior to his termination, is not directly relevant to this case since terminating an employee for inadequate work is a valid "cause" for termination under section 2021(b)(1). (FN3) See Clayton v. Blachowske Truck Lines, Inc., 815 F.2d 1203, 1205 (8th Cir.1987); Henry v. Anderson County, Tennessee Office of the Sheriff, 522 F.Supp. 1112, 1115 (E.D.Tenn.1981).

In response to the obvious conclusion that his notice was inadequate, Burkart now argues that his delay until Friday at 4:45 was not his fault but was caused by Post's inability to see him earlier in the week. This claim, simply put, is incredible. Burkart could easily have protected his employer simply by giving notice to other officials in the company. While Burkart contends that he could not discuss the matter, even initially, with his supervisor because he did not trust him, his subjective dislike or distrust of his supervisor is no justification for his failure to notify any of his superiors of his decision to seek leave.

In summary, the record reveals no genuine dispute of the following finding made by the magistrate:

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The plaintiff's decision to leave on National Guard duty and the defendant's decision to terminate the plaintiff's employment took place in the context of a somewhat contentious employment relationship and actual notice took place after a generally unfavorable performance review with the prospect of an unattractive transfer. There was simply no excuse for not keeping defendant informed of the National Guard duty through plaintiff's supervisor, Mr. Aston, or in casual conversation with Mr. Post, since plaintiff saw him frequently during the day. A note or any other means designed to give prompt notice would also have been effective.

Burkart v. Post-Browning, Inc., No. C-1-85-1618, slip op. at 4-5 (S.D.Ohio Jan. 27, 1987). We conclude that Burkart's notice was inadequate since there were sufficient options available for him to give adequate notice. The record is convincing that it was Burkart, not his employer, who used his military duty as a pretext to mask his real desire to terminate his employment with Post-Browning. The Veterans' Act was drafted with the intent to shield a serviceman from discrimination by his employer, not to arm him with a sword to punish his employer for some perceived wrong unconnected to his status.

In light of our conclusion that Burkart's notice was inadequate we need not determine whether his case is barred by principles *1251. of collateral estoppel arising from the common pleas court's determination denying his claim for unemployment benefits. Whether we are bound by that court's conclusions or not, we are bound as a matter of simple reality to agree that "the employer's interests were damaged by the appellant's willful, knowing misconduct and failure to give notice."

The judgment of the district court is therefore AFFIRMED.

FN1. Our conclusion that it is the employee's duty to minimize inconvenience to the employer is further supported by the detailed restrictions on the length of travel for leave set forth in the statute. See, e.g., 38 U.S.C. Sec. 2024(d). Clearly, Congress wanted to prevent a reservist from being discriminated against without providing the reservist with unnecessary power to abuse that protection.

FN2. In contrast, the only other circuit that appears to have considered this question determined that the adequacy of a reservist's notice is a conclusion of law. Sawyer, 836 F.2d at 1260. Although the Tenth Circuit did not set forth the basis for this holding, we attribute it either to that court's reliance on section 2024(d) for its conclusion that adequate notice is required, or on the case law within that circuit regarding the more general issue of whether the adequacy of notice is a question of fact or of law.

In contrast, the D.C. Circuit indicated that a general, "for cause" basis for dismissing a reservist was a finding of fact:

Behavior that is immoral can be 'cause' for discharge. Veterans must conform to the 'ordinarily expected standards of personal conduct.' The question as to the content of 'ordinarily expected standards' of conduct is of a kind normally left to the trier of fact, and is one on which evidence may rightly be tendered. The ultimate issue here, which is interwoven with such questions of fact, is whether the conduct was or should have been known to the employee to be prohibited by the employer.

Carter, 407 F.2d at 1246 (footnotes omitted).

FN3. Specifically, Post-Browning argues that Burkart's work was inadequate, but rather than firing Burkart they intended to transfer his services. Thus, they indicate that had Burkart's work been satisfactory, he probably would not have been terminated, regardless of his inadequate notice. In contrast, Burkart alleges that his work was at least satisfactory.

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Thomas Henry CARTER, Appellant,
v.
UNITED STATES of America et al., Appellees.

No. 20694.

United States Court of Appeals District of Columbia Circuit.

Argued Sept. 20, 1967.

Decided July 26, 1968, Petition for Rehearing Denied Dec. 13, 1968.

Action by discharged employee of Federal Bureau of Investigation to challenge validity of his discharge. The United States District Court for the District of Columbia, Alexander Holtzoff, J., granted judgment in favor of the United States without a trial and the employee appealed. The Court of Appeals, Leventhal, Circuit Judge, held that discharged employee of Federal Bureau of Investigation who was a veteran within the protection of the Universal Military Training and Service Act was entitled to trial on question of whether his conduct in engaging in heterosexual petting and sleeping with a woman without engaging in sexual intercourse was understood by average FBI clerical employee to be outside 'ordinarily expected standards of personal conduct' to which they must adhere or be discharged.

Order vacated and cause remanded.

Danaher, Circuit Judge, dissented.

[1] OFFICERS AND PUBLIC EMPLOYEES⇐ 69.4
283⇐69.4
Employees of Federal Bureau of Investigation are outside the classified civil service. 5 U.S.C.A. §§ 7501, 7512; 28 U.S.C.A. § 536.

[2] OFFICERS AND PUBLIC EMPLOYEES⇐ 68
283⇐68
Where employee of Federal Bureau of Investigation was not preference eligible at time of his discharge, he was not entitled to protection of Veterans Preference Act. 5 U.S.C.A. § 7512.

[3] UNITED STATES⇐ 36
393⇐36
Because of exemption of Federal Bureau of Investigation from civil service laws, the FBI is generally free to discharge its employees for reasons it chooses, subject only to constitutional limitations. 5 U.S.C.A. §§ 7501, 7512; 28 U.S.C.A. § 536; Universal Military Training and Service Act, § 9(c), 50 U.S.C.A. App. § 459(c).

[4] ARMED SERVICES⇐ 115(2)
34⇐115(2)
Like any other employer, the Federal Bureau of Investigation is subject to the provisions of the Universal Military Training and Service Act by which Congress grants special rights and protections to the returning veteran: the right to reinstatement in civilian job he held prior to military service and the right to be free in the first year after resumption of civilian life from discharge for other than "cause". Universal Military Training and Service Act, § 9(b, c), (g) (1), 50 U.S.C.A. App. § 459(b, c), (g) (1).

[5] ARMED SERVICES⇐ 122(4)
34⇐122(4)
Under statute giving a returning veteran a right to be free of discharge by his employer except for "cause", employer has burden of coming forward with cause sufficient to justify a discharge from employment. Universal Military Training and Service Act, § 9(b, c), (g) (1), 50 U.S.C.A. App. § 459(b, c), (g) (1).

[6] FEDERAL COURTS⇐ 232
170B⇐232
The United States District Court would have jurisdiction to consider whether discharged employee of Federal Bureau of Investigation was entitled to clearance of his record from stigma of discharge and to damages. Universal Military Training and Service Act, § 9(c, d), 50 U.S.C.A. App. § 459(c, d); 28 U.S.C.A. § 1346(a) (2).

[7] ARMED SERVICES⇐ 120
34⇐120
Although a private employer may have right, in absence of statute or contract to the contrary, to fire an employee for personal reason, unrelated to job function, that appeal to the employer, that does not mean that the employer may fire a returning veteran for the same reason as constituting "cause" within provisions of Universal Military Training and Service Act granting right to reinstatement in civilian job to veteran and right to be free in first year after resumption of civilian life from discharge for other

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than "cause". Universal Military Training and Service Act, § 9(c, d), 50 U.S.C.A. App. § 459(c, d); 28 U.S.C.A. § 1346(a) (2).

[8] ARMED SERVICES⇐ 120
34⇐120
A policy concerning grounds of discharge cannot be invoked by civilian employer as justification for firing a veteran within one-year period after veteran's return to civilian life, even for acts that would lead to discharge of ordinary civilian employees, if veteran was not given fair notice that the acts constituted cause for discharge. Universal Military Training and Service Act, § 9(c, d), 50 U.S.C.A. App. § 459(c, d); 28 U.S.C.A. § 1346(a) (2).

[9] ARMED SERVICES⇐ 114(2)
34⇐114(2)
The veterans' protections under the Universal Military Training and Service Act should be construed liberally for the benefit of those who left private life to serve their country in its hour of great need. Universal Military Training and Service Act, § 9(c, d), 50 U.S.C.A. App. § 459(c, d); 28 U.S.C.A. § 1346(a) (2).

[10] ARMED SERVICES⇐ 115(2)
34⇐115(2)
The United States as an employer is under greater restrictions than a private employer with respect to returning veterans and the requirement that there be "cause" for discharge imposes higher duties on the government than merely abstaining from violation of constitutional rights. Universal Military Training and Service Act, § 9(c, d), 50 U.S.C.A. App. § 459(c, d); 28 U.S.C.A. § 1346(a) (2).

[10] ARMED SERVICES⇐ 120
34⇐120
The United States as an employer is under greater restrictions than a private employer with respect to returning veterans and the requirement that there be "cause" for discharge imposes higher duties on the government than merely abstaining from violation of constitutional rights. Universal Military Training and Service Act, § 9(c, d), 50 U.S.C.A. App. § 459(c, d); 28 U.S.C.A. § 1346(a) (2).

[11] ARMED SERVICES⇐ 120
34⇐120
The "cause" provision in the Universal Military Training and Service Act pertaining to re-employment rights of veterans was intended by Congress to provide the re-employed veteran with protection of reasonableness similar to that employed by union member protected by provision in collective bargaining agreement limiting discharge to cause. Universal Military Training and Service Act, § 9(c, d), 50 U.S.C.A. App. § 459(c, d); 28 U.S.C.A. § 1346(a) (2).

[12] ARMED SERVICES⇐ 120
34⇐120
Whether employer acted reasonably in discharging veteran for "cause" is criterion generally applied where an employment contract is terminated by employer because of employee misconduct. Universal Military Training and Service Act, § 9(c, d), 50 U.S.C.A. App. § 459(c, d); 28 U.S.C.A. § 1346(a) (2).

[13] ARMED SERVICES⇐ 120
34⇐120
The discharge by an employer of a veteran may be upheld as one for "cause" only if it is reasonable to discharge employees because of certain conduct and the veteran had fair notice, express or fairly implied, that such conduct would be grounds for discharge. Universal Military Training and Service Act, § 9(c, d), 50 U.S.C.A. App. § 459(c, d); 28 U.S.C.A. § 1346(a) (2).
See publication Words and Phrases for other judicial constructions and definitions.

[14] ARMED SERVICES⇐ 120
34⇐120
Grounds of discharge of an employee that do not violate any laws when applied to an unprotected employee do not constitute statutory "cause" to fire a returning veteran unless the employer goes further than asserting his own subjective feelings and also meets burden of showing objective conduct on part of employee that satisfies some objective standard of cause. Universal Military Training and Service Act, § 9(c, d), 50 U.S.C.A. App. § 459(c, d); 28 U.S.C.A. § 1346(a) (2).

[15] ARMED SERVICES⇐ 120
34⇐120
Behavior that is immoral can be "cause" for discharge of a veteran who is otherwise protected by the re-employment provision of the Universal Military Training and Service Act. Universal Military Training and Service Act, § 9(c, d), 50 U.S.C.A. App. § 459(c, d); 28 U.S.C.A. § 1346(a) (2).

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[16] ARMED SERVICES⇐ 115(8)
34⇐115(8)
Veterans must conform to the ordinarily expected standards of personal conduct. Universal Military Training and Service Act, § 9(c, d), 50 U.S.C.A. App. § 459(c, d); 28 U.S.C.A. § 1346(a) (2).

[17] ARMED SERVICES⇐ 122(1)
34⇐122(1)
The question as to content of "ordinarily expected standards" of conduct to which a re-employed veteran must conform is for the trier of fact in proceeding by a discharged veteran for reinstatement to employment. Universal Military Training and Service Act, § 9(c, d), 50 U.S.C.A. App. § 459(c, d); 28 U.S.C.A. § 1346(a) (2).

[18] MASTER AND SERVANT⇐ 30(1)
255⇐30(1)
Principle that rules must be known by those who are expected to observe them is applicable where the reasonableness of employer action in discharging employee is challenged.

[19] UNITED STATES⇐ 36
393⇐36
Federal Bureau of Investigation employee's actions of heterosexual petting and sleeping with woman without having sexual intercourse was not such that, as matter of law, a reasonable man would know it was conduct unbecoming an employee of the bureau.

[20] UNITED STATES⇐ 36
393⇐36
Trial court could not properly deny discharged FBI employee trial on issue of whether misconduct was unbecoming an employee of the Bureau on ground that "FBI Handbook" clearly put employees on notice that they must meet not only general standards of their own community, but also special standards of "the lady from Dubuque".

[21] ARMED SERVICES⇐ 122(4)
34⇐122(4)
The burden of justifying a discharge of a veteran where cause is required is on the employer. Universal Military Training and Service Act, § 9(c, d), 50 U.S.C.A. App. § 459(c, d); 28 U.S.C.A. § 1346(a) (2).

[22] ARMED SERVICES⇐ 122(1)
34⇐122(1)
Discharged employee of Federal Bureau of Investigation who was a veteran within the protection of the Universal Military Training and Service Act was entitled to trial on question of whether his conduct in engaging in heterosexual petting and sleeping with a woman without engaging in sexual intercourse was understood by average FBI clerical employee as being outside "ordinarily expected standards of personal conduct" to which they must adhere or be discharged. Universal Military Training and Service Act, § 9(c, d), 50 U.S.C.A. App. § 459(c, d); 28 U.S.C.A. § 1346(a) (2).

[23] FEDERAL COURTS⇐ 870.1
170B⇐870.1
Formerly 170Bk870
Whether discharged Federal Bureau of Investigation employee's conduct was cause sufficient to warrant rejection of his proposed resignation and the insistence by the government on the stigma of a "discharge" from the FBI was question for trier of fact in employee's challenge of validity of his discharge.

[24] ARMED SERVICES⇐ 122(2)
34⇐122(2)
In absence of express language in statute prohibiting an employer from discharging veteran except for cause within one year after return to civilian life, reviewing court would not conclude that district court was without jurisdiction of an action to remedy the case of a wrongful discharge by the United States. Universal Military Training and Service Act, § 9(c, e) as amended 50 U.S.C.A. App. § 459(c, e).

[25] ARMED SERVICES⇐ 122(2)
34⇐122(2)
District court had jurisdiction in action for damages in case of wrongful discharge from employment by United States of a veteran within one year after his return to civilian life. Universal Military Training and Service Act, § 9(c, e) as amended 50 U.S.C.A. App. § 459(c, e).

[26] ARMED SERVICES⇐ 122(1)
34⇐122(1)
Factual issues as to whether FBI employee's discharge within one year after termination of his military service was for cause was matter for determination by district court rather than by Civil Service Commission. Universal Military Training and Service Act, § 9(b, e) as amended 50 U.S.C.A. App. § 459(b, e).

*1241 **306 Mr. Richard M. Millman, Washington,

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D.C., with whom Miss Mary M. Burnett, Washington, D.C., was on the brief, for appellant.

Mr. Thomas Lumbard, Asst. U.S. Atty., with whom Messrs. David G. Bress, U.S. Atty., Frank Q. Nebeker and Joseph M. Hannon, Asst. U.S. Attys., were on the brief, for appellees.

Messrs. Ralph J. Temple and Lawrence Speiser, Washington, D.C., filed a brief on behalf of The National Capital Area Civil Liberties Union and the American Civil Liberties Union as amici curiae urging reversal.

Before DANAHER, LEVENTHAL and ROBINSON, Circuit Judges.

LEVENTHAL, Circuit Judge:

Appellant Carter brought an action asserting that his discharge from Government and constitutional rights. He appeals and constitutional rights. He appeals to this court on the ground that the District Court erred when it granted judgment in favor of the Government without a trial.

The facts shown on the record before us are these. Carter was hired by the Federal Bureau of Investigation (FBI) in 1960 as a clerk in its identification division. His employment with the Bureau was interrupted by his enlistment in the Air Force. After completing his military service in 1965 he was reinstated at his old job. In August 1965, the FBI received an anonymous letter complaining that Carter was 'sleeping with young girls and carrying on.' [FN1] When questioned about the matter by his supervisor, Carter admitted that a female friend had twice stayed overnight at his apartment. He admitted that they slept together, although not nude, in the same bed, but insisted that they did not have sexual relations. He told his supervisor that the lady had been visiting Washington from out of town for a period of three days, that they had been going together for several years, and that he was seriously considering marriage. On one occasion she had visited at his home in Kentucky and stayed with his brother and sister-in-law.

FN1. In full, the letter reads: 'Dear Sirs: Would like to make a complaint about a fellow working for the FBI, his name is Tom H. Carter who lives at Kennebeck House or apts; sleeping with young girls & carrying on; it annoys me terrible: I wish you can do something about it. Thank you.'

The supervisor separately questioned each of the three other FBI employees who shared appellant's apartment. One did not know whether the lady had stayed overnight at their apartment. The other two knew she had stayed overnight, but had no knowledge of what had taken place in appellant's bedroom. When questioned, they said they had not heard any noises indicative of sexual relations. They said they had no reason to doubt the account they were told appellant had given the FBI. As one of them put it, 'I consider (Carter) as a person of high quality.'

Carter was dismissed by the FBI for 'conduct unbecoming an employee of this Bureau.' Through counsel he petitioned to be permitted to resign, rather than have his employment record marred by such a dismissal. The FBI, on reconsideration, adhered to its prior action. Carter sued for reinstatement and back pay, and served interrogatories. Without answering. the Government pressed a motion for summary judgment, which the District Court granted, holding that appellant was not entitled to a trial.

*1242 **307 [1][2] We affirm the District Court's ruling that Carter had no statutory rights to employment under the Civil Service laws [FN2] or the Veterans Preference Act. [FN3] However we cannot agree with the District Court's conclusion that Carter was not entitled to a trial to determine whether the discharge violated Section 9(c) of the Universal Military Training and Service Act, 50 U.S.C. App. § 459(c) (1964). We do not rule on appellant's claim of unconstitutional arbitrariness. [FN4]

FN2. At the time of the discharge, federal employees in the 'classified civil service of the United States' were protected from discharge 'except for such cause as will promote the efficiency of said service.' § 6. Act of August 24, 1912, 37 Stat. 555. With slight variations in language, the same rule is stated by the present statute, 5 U.S.C. § 7501. Employees of the FBI, however, had been held to be outside the classified service, on the basis of an administrative construction of a statute providing, 'None of the funds appropriated for the Federal Bureau of Investigation shall be used to pay the compensation of any civil-service employee.' § 5, Act of July 28, 1950, 64 Stat. 380. That administrative construction has since been affirmed by Congress, 28 U.S.C. § 536 (Supp. II, 1965-66).

FN3. The Veterans Preference Act limits to 'such cause as will promote the efficiency of the service' the grounds for discharge of a 'preference eligible' federal employee, 5 U.S.C. § 7512. At the time of the

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discharge, however, Carter was not preference eligible.

FN4. It seems plain to us that no discharge could be for 'cause' within the meaning of § 9(c) if it were so arbitrary and unreasonable as to violate due process. We therefore need not reach constitutional questions in this case.

[3][4] Because of the exemption of the FBI from the civil service laws, the Bureau is generally free to discharge its employees for any reasons it chooses, subject only to constitutional limitations. Obviously, however, that discretion is subject to any specific limitations that Congress has chosen to impose. This much is conceded by appellee. Thus, like any other employer, the FBI is subject to the provisions of § 9(c) of the Universal Military Training and Service Act by which Congress granted special rights and protections to the returning veteran: the right to reinstatement in the civilian job he held prior to military service; the right to be free in the first year after resumption of civilian life from discharge for other than 'cause'.

[5] The law giving a returning veteran a right to be free of discharge except for 'cause' puts on the employer the burden of coming forward with a cause sufficient to justify the discharge. We think Carter has a right to a trial on issues of fact involved in that claim, and to a court determination of that claim in the light of evidence adduced in the courtroom. We now set forth the analysis underlying our conclusions.

[6] Carter does not put before this court any prayer for relief embracing his future employment by the FBI. There is, however, jurisdiction in the District Court to consider whether appellant is entitled to clearance of his record from the stigma of the discharge and to damages. We see no valid basis for disclaiming jurisdiction either in the District Court or in this court. [FN5]

FN5. Jurisdiction lies in the District Court pursuant to 28 U.S.C. § 1346(a)(2).
50 U.S.C. App. § 459(d) provides an express judicial remedy for violation of the reemployment provisions only where there is a 'private' employer, but that is not an implied repealer of the traditional jurisdiction of the District Court and the Court of Claims to award damages against the Government. Kephart v. United States, 75 F.Supp. 1020, 109 Ct.Cl. 646 (1948). The House version of the 1948 reenactment of selective service and reemployment rights, H.R. 6401, provided expressly for a remedy in the District Courts to protect federal employees' reemployment rights. See 94 Cong.Rec. 8696. The Senate Bill, S. 2655, had a different scheme, and that version was accepted at conference. Absent some indication in the legislative history, we see no reason for imputing a dislike of judicial remedies into the choice of the better drafted measure.
At oral argument, counsel for appellant conceded that Carter has no desire to work for the FBI again. Consequently, we need not consider whether reinstatement is an appropriate remedy where the FBI is the agency involved.

*1243 **308 A. THE STATUTORY BACKGROUND

1. The right of veterans to reinstatement in civilian employment after honorable discharge from the armed forces was established by 1940 legislation. [FN6] These provisions were reenacted without substantial Change in § 9 of the Universal Military Training and Service Act. [FN7] They reflect an effort 'to offer * * * as much protection with respect to reemployment and retention of employment benefits as is within reasonable bounds,' 86 Cong.Rec. 10095 (1940) (Remarks of Sen. Sheppard). The law responded to the widespread difficulties that World War I veterans had in readjusting themselves to civilian lives. People drawn into the labor force by wartime production needs often kept their newfound jobs, shutting out veterans who needed time to reestablish their skills as well as their stability. Thus, at one time or another more than 200,000 World War I veterans ended up jobless and enrolled in Civilian Conservation Corps camps. [FN8] That worry over losing a job might have substantial adverse impact on the morale of the armed services is plain. [FN9] Indeed, the morale problem was viewed as the source of Congressional power to enact reemployment laws writing new terms into private labor contracts beyond the normal reach of Congress. 86 Cong.Rec. 10573 (1940).

FN6. Section 8, Selective Training and Service Act of 1940, 54 Stat. 885 (1940).

FN7. '§ 459(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, (honorable discharge) and (2) makes application for reemployment within ninety days after he is relieved from such training and service * * *
(A) if such position was in the employ of the United States Government, * * * such person shall-- (i) if still qualified to perform the duties of such position, be restored to such position or to a position of like

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seniority, status, and pay * * *.'
Section 459(c) provides that 'any person who is restored to a position (in accord with § 459(b)) * * * shall not be discharged from such position without cause within one year after such restoration.'
Section 459(g)(1) makes these provisions applicable to enlistees.

FN8. See Andrews, Re-employment and Postwar Planning, 220 The Annals 186 (1942).

FN9. Thus, present civil service regulations require that employees be told of their reemployment rights at the time of entering military service. 5 C.F.R. § 353.105 (1968).

This profound social problem of the returning serviceman is partially remedied by the reinstatement provision of § 9(c). That reinstatement right is buttressed by the further provision that for one year after reemployment a veteran has a Federal right that protects him against discharge from his regained job except for 'cause.' This gives a reasonable period designed to 'provide for the rehabilitation of the returning veteran so that he might be equipped to enter a highly competitive world of job finding without the handicap of a long absence from work, as well as to provide for his financial stability for the period of at least one year following his discharge from service.' Key v. General Cable Corp., 59 F.Supp. 358, 360 (D.N.J.1945). [FN10]

FN10. See also Marque v. Stern, 88 F.Supp. 306, 308 (M.D.Pa.1950); Niemiec v. Seattle Ranier Baseball Club, Inc., 67 F.Supp. 705, 707-708 (W.D.Wash.1946); Dacey v. Bethlehem Steel Co., 66 F.Supp. 161, 164 (D.Mass.1946).

2. The FBI asserts that it had 'cause' to dismiss Carter. [FN11] Essentially the contention is that any FBI employee would be fired for this conduct, and the application of a general FBI personnel policy which does not discriminate against veterans must be upheld unless so arbitrary as to violate due process.

FN11. The FBI does not contend that it has been exempted from the operation of the statute. Indeed, Government counsel is to be commended for calling it to the attention of the District Court.

*1244 **309 [7] A private employer may have the right, in the absence of statute or contract to the contrary, to fire an employee for personal reasons, unrelated to job function, that appeal to the employer, the color of hair, a dislike of men who smoke, or have a tattoo, etc. That does not mean that the employer can fire a returning veteran for the same reason as constituting 'cause'.

[8] Moreover, a policy concerning grounds of discharge cannot be invoked as justification for firing a veteran within the one-year period, even for acts that would lead to discharge of ordinary civilian employees, if the veteran was not given fair notice that the acts constituted cause for discharge.

[9][10] It is settled that veterans protections under the Act should be construed liberally 'for the benefit of those who left private life to serve their country in its hour of great need.' Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285, 66 S.Ct. 1105, 1111, 90 L.Ed. 1230 (1946). [FN12] A veteran's rights stand especially firm when it is the federal government that is his employer. Congress has been particularly concerned that the federal government lead the way in smoothing the reintegration of veterans into civilian life, and carry out policies that serve as an example for employers generally. This approach germinated in World War I, when federal civil service employees serving in the armed forces were guaranteed reemployment by Act of Congress at a time when no such right was provided against private employers. [FN13] Moreover, under the present law the Government cannot invoke the defense available to a private employer that circumstances make reemployment unreasonable. The Supreme Court has explicitly held that the Government-employer is under greater restrictions than a private employer. [FN14] The requirement that there be 'cause' for discharge imposes higher duties on the Government-as-employer than merely abstaining from violation of constitutional rights, a requirement that gives no substantive content to the statute, or merely refraining from discrimination against veterans or the veteran.

FN12. See also Rix v. Turnbull-Novak, Inc., 260 F.2d 785, 789 (8th Cir. 1958); Mann v. Crowell-Collier Publishing Co., 239 F.2d 699, 701 (6th Cir. 1956); Boone v. Fort Worty & D. Ry., 223 F.2d 766, 770 (5th Cir. 1955); Travis v. Schwartz Manuf. Co., 216 F.2d 448, 454 (7th Cir. 1954).

FN13. 41 Stat. 142 (1919).

FN14. See Hilton v. Sullivan, 334 U.S. 323, 331, 68 S.Ct. 1020, 92 L.Ed. 1416 (1948), holding that a 'discharge' results from acts of Government-employer even though such acts by a private employer would

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not constitute a discharge.

[11][12][13] 3. The 'cause' provision was inserted by Congress to provide the reemployed veteran with a protection of reasonableness similar to that enjoyed by a union member protected by provisions in a collective bargaining agreement limiting discharge to cause. [FN15] The ultimate criterion, whether the employer acted reasonably, is the one generally applied where an employment contract is terminated by an employer because of employee misconduct, [FN16] and that standard is appropriate under this Federal statute. Kemp v. John Chatillon & Sons, 169 F.2d 203 (3rd Cir. 1948). We think a discharge may be upheld as one for 'cause' only if it meets two criteria of reasonableness: one, that it is reasonable to discharge employees because of certain conduct, and the other, that the employee had fair notice, express or fairly implied, that such conduct would be ground for discharge.

FN15. See Scoles, Veterans Re-Employment-- Statute and Decisions, 31 Iowa L.Rev. 155, 181 (1946); see also Hoyer v. United Dressing Beef Co., 67 F.Supp. 730, 732 (S.D.Cal.1946).

FN16. 35 Am.Jur., Master & Servant, 45 at 479 (1941); Dufour v. Continental Southern Lines, Inc., 219 Miss. 296, 68 So.2d 489 (1953); Hoyer v. United Dressing Beef Co., supra.

[14] Most of the cases decided under this law have involved discharges for violation *1245 **310 of employer rules or instructions, usually after specific warning. [FN17] While these have been held to constitute 'cause' for descharge under the statute, it is clear that grounds of discharge that do not violate any law when applied to an unprotected employee-- say, that the employer dislikes the employee (without having any reason other than intuition, or personality preference)-- do not constitute statutory 'cause' to fire a returning veteran unless the employer goes further than asserting his own subjective feelings and also meets the burden of showing objective conduct on the part of the employee that satisfies some objective standard of cause. See Cord v. New York Cleaning & Day Works, 88 F.Supp. 704 (D.Conn.1948).

FN17. See, e.g. Fries v. Pennsylvania R.R., 195 F.2d 445 (7th Cir. 1952); Cavanagh v. Pinkerton's Nat'l Detective Agency, Inc., 198 F.Supp. 50 (D.Mass.1961); Pelot v. Schott, 70 F.Supp. 981 (M.D.Penn.1947); Manowitz v. Einhorn Wholesale Grocery, 68 F.Supp. 907 (E.D.N.Y.1946); Basham v. Virginia Brewing Co., 66 F.Supp. 718 (W.D.Va.1946).

B. APPELLANT'S CONDUCT

1. We now consider the issue whether Carter was entitled to a trial on his claim that his discharge was not for cause. We immediately run into the problem that the record does not make clear the exact 'cause' of the discharge. The District Judge granted summary judgment on the ground that regardless of whether Carter's action was moral or immoral, he had been indiscreet in carrying on his relationship. The Government's brief also treats the nexus of the case as including: 'that appellant's sexual misadventures had become sufficiently public knowledge to cause an anonymous complaint to the FBI' (p. 15).

That theory is not maintainable on the present record so as to support summary judgment without a trial. The only conduct before us on this record was limited to two occasions, and in Carter's own apartment. There is no suggestion here that Carter was notoriously promiscuous, consorted with prostitutes or anything of that sort. Certainly Carter's admitted conduct cannot be equated with that generally 'loose' conduct likely to become a matter of public notoriety. The only basis for inferences as to the extent to which Carter's conduct was known outside the circle of his roommates-- also employed by the FBI-- is an anonymous letter. The letter does not indicate how the writer came to know of Carter's acts. For all that is known, the letter might have been written by an FBI employee. [FN18] Even if written by someone outside, that person may have been a snoop, voyeur or crank, in which event it would be insubstantial as tending to prove the conduct came to be 'public knowledge,' much less objectionably notorious. There is good sense as well as fairness in being chary of the anonymous letter. [FN19]

FN18. The writer of the letter know enough about appellant to send the letter to the FBI's Identification Division, where Carter worked, rather than to the main FBI office. Moreover, had he been a resident of the same apartment house, and therefore likely to have observed Carter's coming and going, it is unlikely that he would have misspelled the name of his own apartment building.

FN19. Cf. Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959); Aguilar v. State of Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). In re Burke, 87 Ariz. 336, 351 P.2d 169 (1960).

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The FBI may well have made an informed appraisal, of investigation, that permitted it to ascertain that Carter so conducted himself as to turn a private relationship into a public affront. But that is a question of fact and Carter is entitled to a trial of that fact.

2. We turn to the issue whether 'cause' for discharge was established as a matter of law by Carter's admitted overnight 'necking' and 'petting' with his young lady in his apartment on two occasions. [FN20]

FN20. On this motion for summary judgment, Carter's allegations that no sexual intercourse took place must be taken as true. Nothing, however, indicates that the FBI disbelieved his persistent denials that he had relations on these occasions, cf. McGuire v. United States, 145 Ct.Cl. 17 (1959).

*1246 **311 [15][16][17][18] Behavior that is immoral can be 'cause' for discharge. Veterans must conform to the 'ordinarily expected standards of personal conduct.' [FN21] The question as to the content of 'ordinarily expected standards' of conduct is of a kind normally left to the trier of fact, and is one on which evidence may rightly be tendered. The ultimate issue here, which is interwoven with such questions of fact, is whether the conduct was or should have been known to the employee to be prohibited by the employer. [FN22]

FN21. This language is from the Handbook Veterans Assistance Program of the Selective Service System, § 306.3.

FN22. Basic in our jurisprudence is the principle that rules must be known. That principle is fully applicable where the reasonableness of employer action is challenged. Hamilton v. Love, 152 Ind. 641, 53 N.E. 181 (1899).

[19] That knowledge may, of course, rest on fair implication, even though not made express, as in the kind of job-related misbehavior that is inconsistent with proper attention to work or proper loyalty to the employment relationship. [FN23] But what was known in Carter's case to be prohibited conduct? We do not think it can be said as a matter of law without giving Carter an opportunity to ventilate the facts at trial (including the facts of community standards and FBI standarts), that a reasonable man would know that Carter's admitted conduct was contrary to his employer's rules, as constituting conduct 'unbecoming an employee of this Bureau.' [FN24]

FN23. See Meehan v. Macy, 129 U.S.App.D.C. 217, 392 F.2d 822 (1968).

FN24. Appellee claims (Br. p. 6) that Carter admitted to the investigating agent that his conduct violated the rules and regulations of the Bureau. That agent's statement was only that Carter had said he 'had realized it was the wrong thing to do.' Since Carter denies making even this somewhat ambiguous statement, a triable issue of fact is clearly raised. Carter also alleges: 'Throughout the interview and the preparation of the memorandum, Mr. Whitwam conveyed to me the impression that he did not care for this particular aspect of his job, i.e. investigating alleged improper conduct of employees. He also conveyed the impression that he would write up the report in the most favorable light to me and that probably nothing would come of the incident.' Assuming that Carter made the statement attributed to him, he may be able to show, from the circumstances, that it was intended as a gesture to help smooth the matter over.

Appellant's counsel point out that Carter did nothing more than the 'bundling' condoned in Puritan New England. As for more modern precedent, the law is clear that an unmarried man does not have an 'immoral' character for purposes of exclusion from citizenship even if he goes beyond necking and engages in heterosexual relations. Judge Learned Hand pointed out, 'we have answered in the negative the question whether an unmarried man must live completely celibate, or forfeit his claim to a 'good moral character,'' Schmidt v. United States, 177 F.2d 450, 452 (2d Cir. 1949). [FN25]

FN25. See also In re Edgar, 253 F.Supp. 951 (E.D.Mich.1966); In the matter of O, 2 I & N 840, 843 (1947).

3. The Government's motion put before the court, as an exhibit, the Handbook for FBI Employees, distributed to all FBI employees. We consider whether that Handbook shows that Carter was put on notice that his admitted conduct was prohibited. The Handbook is a description of the FBI and its work, as well as a 'guide' to 'help you refrain from doing anything which would in any way detract from the Bureau's reputation or embarrass it in any manner.' The sole relevant passage is one stating-- 'personal misbehavior of Bureau employees reflecting unfavorably upon them or the Bureau, and neglect of duty cannot be tolerated.'

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[20] The Government invokes the standard of the lady from Dubuque and argues that as the FBI relies on the cooperation of the citizenry it is reasonable to compel moral standards for all employees-- clerks as well as agents-- that *1247 **312 would satisfy that most upright lady. [FN26] Pretermitting the issue whether the standard of the lady from Dubuque would have been reasonable if announced, there is a threshold problem, whether the employees have adequate notice of such a standard. The FBI employees are expressly told in the Handbook that legal gambling is permitted, as is off-duty use of intoxicants, yet these sit poorly with many upright citizens. We do not think a court can deny an employee a trial of the issue on the ground that this Handbook clearly puts FBI employees on notice that they must meet not only the general standards of their own community, but also the special standards of the lady from Dubuque. It should be underscored that the Handbook was not written for FBI agents alone, but is addressed to all FBI employees, including e.g. fingerprint classifiers and file clerks.

FN26. (The FBI) cannot allow the little old lady from Dubuque, for whom Harold Ross did not edit the New Yorker, to withold information * * * because she will not trust an organization whose agents and employees are allowed to 'sleep with young girls and carry on."
Brief for Appellee at 27, citing Thurber, The Years With Ross (1959).

[21][22] 4. In short, the burden of justifying a discharge of a veteran where cause is required is on the employer, Cord v. New York Cleaning & Dye Works, supra. The question is whether the limitation on private life now asserted to apply to all FBI employees is something the average FBI clerical employee should and does know as contemplated by 'ordinarily expected standards of personal conduct.' We cannot say that the answer is so clear that Carter is not even entitled to a trial.

[23] 5. A further question should be explored at trial. Carter requested that he be given permission to tender his resignation, and this was refused. Even if it should be found as a fact that Carter's admitted conduct provided cause for terminating his FBI employment, that would not necessarily mean that the 'cause' was sufficient to warrant rejection of his proposed resignation and insistence on the stigma of a 'discharge' from the FBI, especially if Carter established that he had no subjective awareness that his conduct violated FBI standards. Where Government employment is involved, the label which serves as the reason for leaving it may have important consequences for obtaining future employment. At least we cannot hold as a matter of law on this record that it has no such consequence, [FN27] and that the complaint must be dismissed for that reason. The employee's readiness to resign must be taken into account in considering whether his conduct was so offensive as to give the Government 'cause' under section 9(c) to reject the resignation and insist that he be formally discharged. This is consistent with the language of the statute, and in furtherance of its purpose of protecting the veteran.

FN27. The FBI contends that its employee standards are well known to be very high; and that persons dismissed from the FBI for unbecoming conduct will be hired by other employers, most of whom do not expect as much.
The fact that an FBI dismissal is not fatal does not mean it is not an impediment. The affidavits in the record tendered on behalf of Carter state that when he applied to a local bank for a job the personnel director asked him to provide statements from his roommates corroborating his account of why he was discharged from the FBI. They furnished such statements, and were subsequently advised by the FBI that they had thereby violated the FBI regulation which forbids an FBI employee from commenting to an outside source concerning any other employee of the FBI, past or present. One resigned in a few days. The other was transferred from his work as file clerk to polishing cabinets in the file room. After 13 days at that assignment, he tendered his resignation.
Obviously the fact that Carter was finally able to get a job with a local bank by no means establishes that the stigma of dismissal will not be harmful to him either by depriving him of opportunities with other potential employers, or as depriving him of better opportunities with this bank, now or in the future.

*1248 **313 The order of the District Court is vacated and the case remanded for further proceedings.

So ordered.

*1251 **316 Supplemental Opinion

LEVENTHAL, Circuit Judge:

[24][25] Two of the points made in appellees' petition for rehearing merit an additional word. First is the request that we reconsider our ruling on jurisdiction. Appellees apparently agree that the Government is like any other employer in being prohibited by

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Congress from discharging a veteran except for cause within the year after his return. Appellees argue, however, that there is no jurisdiction in the District Court in a case of wrongful discharge by the Government. In essence appellees are arguing that Congress meant to provide a right without a judicial remedy. It would take express language to lead us to conclude that Congress intended such an anomalous result. [FN1] It would be contrary to the extreme solicitude Congress has manifested for the returning veteran, and its efforts to put the Government-employer in the foreground of those efforts. The contention, if sound, would confront all employees of the Government returning from military service. True, the statute (§ 9) [FN2] provides that the Civil Service Commission shall have jurisdiction to order a veteran's reinstatement in the public sphere, and does not refer to the possibility of a judicial order. But the appropriateness of a judicial order for reinstatement of a veteran, not ordered by the Commission, certainly raises special issues, of possible clogging of the wheels of government. But so far as actions for damages, or declaratory and equitable relief, are concerned, we see no basis for concluding that Congress intended to override and remove customary judicial remedies. [FN3] The contention that Congress intended a right without any judicial remedy is neither expressed in the statute, nor supported by the legislative history [FN4] or cases cited by the Government. [FN5] We think the contention is unsound.

FN1. Cf. Jones v. Mayer Co., 392 U.S. 409, 414 n. 13, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968).

FN2. 50 U.S.C.App. § 459(e) (1964).

FN3. See Kephart v. United States, 75 F.Supp. 1020, 109 Ct.Cl. 646 (1948).

FN4. The Government adverts to the failure of Congress to enact the House version of 9(c). H.R. 6401, which provided that an aggrieved government employee should initially seek an administrative remedy-- compensation and restoration-- with judicial relief to be available when an 'agency refused to take the corrective action recommended by the Commission.' 94 Cong.Rec. 8696. The bill conferred jurisdiction to 'require specific compliance with the recommendation' and to enter a judgment for damages. The fact that this version was rejected by the conference in favor of the Senate version provides no meaningful support for appellees' argument. What the House had provided was a suit to enforce the Government's determination, not to vacate it-- and that involves wholly different considerations. It may well be that the Congress decided, on further reflection, that it was so unlikely that an agency would defy the Commission as to make it unnecessary to require explicit provision for that contingency. The conferees may have wished to leave it to courts to determine whether and in what circumstances equity should take jurisdiction in furtherance of the public interest, to enforce the Commission's award. The courts had long since announced the doctrine establishing equitable jurisdiction in furtherance of the public interest, to enforce an administrative award even in the absence of express statutory provision therefor. See, e.g., Virginian Ry. Co. v. System Fed'n No. 40, 300 U.S. 515, 549-551, 552, 57 S.Ct. 592, 81 L.Ed. 789 (1937).

FN5. In both Campbell v. Deviny, 81 F.Supp. 657 (1949), aff'd, 90 U.S.App.D.C. 176, 194 F.2d 881 (1952); and Insular Police Comm'n v. Lopez, 160 F.2d 673 (1st Cir.), cert. denied, 331 U.S. 855, 67 S.Ct. 1743, 91 L.Ed. 1863 (1947), the amount in controversy did not meet the $3000.00 jurisdictional minimum. Congress has since vested the district courts with jurisdiction in suits against the Government for less than $10,000. 28 U.S.C. § 1346(a)(2) (1964).
The discussion of mandamus in these cases is rooted in their context of the employee's prayer for a judicial action placing him in the federal service. Our opinion was careful to exclude that remedy from the permissible scope of the litigation before us.

*1252 **317 [26] Appellees also urge for the first time, on petition for rehearing, that the determination of any factual issues arising out of the remand in this case must be made in the first instance by the Civil Service Commission. This is a switch from the Government's prior submission, which sought to emphasize the FBI's independence of the Civil Service Commission. The Government relies on section 9(c) which refers to the Commission cases where an employee seeks restoration to a position under section 9(b). Section 9(c) involves precisely the determination-- of placement in the federal service-- which we agree lies outside the judicial remedies. These determinations require the executive expertise that the Commission has developed in the course of administering its other statutory duties. See footnote 2 to original opinion. They are plainly distinguishable from actions for damages or equitable relief, especially where the agency involved is not normally within the cognizance of the Civil Service Commission.

Petition for rehearing denied.

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**313 *1248 DANAHER, Circuit Judge (dissenting):

Let it be observed immediately that the sitting division is unanimous in concluding that this appellant was not entitled to the procedural protections against discharge of the Veterans Preference Act, as amended, 5 U.S.C. § 863 (1964), or the Lloyd-LaFollette Act as amended, 5 U.S.C. § 652. He never had Civil Service status. [FN1]

FN1. As of March 22, 1960, he had been offered a probationary appointment in the Bureau as a clerk. He then was informed that his continued employment 'would be contingent' upon his 'maintaining a satisfactory record. Positions in the Federal Bureau of Investigation are excepted by law from the competitive Civil Service, in view of which your acceptance of this appointment will automatically constitute relinquishment during your tenure of any such competitive status you may have acquired.'

Next, let it be noted, he does not seek reinstatement to his former position; although in his complaint he stated that he had been 'irreparably harmed in all his future job opportunities' because of the allegedly unlawful discharge, his own affidavit shows that he lost scant time in securing a position with a local bank.

Rather, he is asking this court to place its imprimatur on his conduct, arguing through counsel that the appellant can not be faulted for engaging in 'perfectly normal sexual activities * * * which Mr. Kinsey in his Report has calculated about 90 per cent of the male population engages in.' He supports that contention by supplying Chapter 16 of The Sexual Behavior in the Human Male by Kinsey, Pomeroy and Martin entitled 'Heterosexual Petting,' an exhibit in the District Court.

The District Judge was unimpressed, just as had been the Bureau officials. I range myself with them. To the extent that it is suggested that we may exercise a discretion in the matter I would deny relief. Let us see just what happened.

Following military service, this appellant was notified that he was eligible for reinstatement as a fingerprint clerk, Grade GS-4, in the Identification Division of the Federal Bureau of Investigation. [FN2] As of August 26, 1965, he was informed that he was being dropped from the rolls of the Bureau 'in view of your conduct unbecoming an employee of this Bureau.' [FN3]

FN2. Between May 22, 1961 and May 21, 1965, the appellant had served in the United States Air Force. He thus became entitled to restoration to his former position pursuant to the Universal Military and Training Service Act, 50 U.S.C. App. 451 et seq. (1964), and was not to 'be discharged from such position without cause within one year after such restoration,' 459(c)(1).

FN3. The Handbook for FBI Employees (1964) provides:
'Personal misbehavior of Bureau employees reflecting unfavorably upon them or the Bureau, and neglect of duty cannot be tolerated. Any such misconduct or any neglect of duty or allegations of such nature must be promptly reported to the Bureau by any employee learning of it.'

This court on many occasions has recognized the principle that the power to remove inferior Government employees is an incident of the power to appoint them, following the statement in Myers v. United States, 272 U.S. 52, 161, 47 S.Ct. 21, 71 L.Ed. 160 (1925). Put another way the interest of a Government employee in retaining his job can be summarily denied. 'It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer.' Cafeteria and Restaurant Workers etc. v. McElroy, 367 U.S. 886, 896, 81 S.Ct. 1743, 1749, 6 L.Ed.2d 1230 (1961); Vitarelli v. Seaton, 359 U.S. 535, 539, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959). No matter who has stated the law, no one has said it better than Mr. Justice Reed speaking for the Court of Claims in *1249 **314 Batchelor v. United States, 169 Ct.Cl. 180, 183, cert. denied, 382 U.S. 870, 86 S.Ct. 147, 15 L.Ed.2d 109 (1965), where we read:

'The Supreme Court in Keim v. United States, 177 U.S. 290 (1900), considered the question of whether or not the courts may supervise the acts of an executive department head in discharging an employee. The Court's decision in that case clearly placed the removal of executive department employees within the ambit of executive discretion, and ruled that until Congress, by 'special and direct legislation makes provisions to the contrary,' the courts cannot review the soundness or propriety of the exercise of the department head's discretion. This case stands as a solid milestone in a long line of unbroken authorities holding that where there are no established procedures or statutes to be followed, removal of an employee is solely within the discretion of agency officials and

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accordingly may be effected without giving reason. See Cafeteria Workers v. McElroy, 367 U.S. 886, 897-97 (1961) and cases cited therein.'

Where there no more, the Bureau's action clearly would have been comprehended within the principles thus stated. Here, however, some would say that 'cause,' the 'personal misbehavior' and 'misconduct' referred to in the Handbook for FBI Employees [FN4] is not to be equated with or deemed adequate as measuring the 'cause' specified in section 459(c)(1) of the Act. [FN5] Some would say that Carter must be given 'an opportunity to ventilate the facts at trial,' my colleagues taking the position apparently that only thus can it be determined that a 'reasonable man would know that Carter's admitted conduct' was contrary to his employer's rules as constituting conduct 'unbecoming an employee of this Bureau.'

FN4. Supra note 3.

FN5. Supra note 2.

What facts would they 'ventilate'? Even as they observe that the conduct in question was 'admitted'?

The 'facts' as to that conduct were supplied by the appellant. Obviously, his superiors were entitled to draw from the facts of the 'admitted conduct' such reasonable inferences as naturally flow from such facts. I venture to suggest that in scores of cases, month after month, throughout the courts of this land the facts 'admitted' here give rise to judicial action culminating in a decree of divorce, with its attendant consequence. Cause?

Here, the record shows, four FBI employees shared an apartment with two bedrooms. Usually, the appellant shared a bedroom with one of his fellow FBI employees. Some shifting in arrangements within the menage became necessary on the evening of August 15, 1965. At least one employee had to give up his bed and join the other two as the quarters were reassigned. All three knew that this appellant brought a young lady to the apartment. [FN6] She stayed there all night August 15th and again all night August 17th. On those nights, in Carter's own words, in his own handwriting, he stated: 'We slept in the same bedroom and in the same bed.' The appellant told an inquiring Special Agent that each night the girl had worn night clothes, while on one night he had worn Bermuda shorts and a tee shirt and on the other, had worn Bermuda shorts and a sport shirt. He added that on the intervening night of August 16th, with permission from an apparently complacent relative, he had slept at a different apartment, with the young lady on a couch while he slept on the floor.

FN6. The statements to the Special Agent supplied by Carter's fellow FBI employees, his usual roommates, substantially corroborated his own version of the events under discussion.

It has been contended that the discharge of the appellant was arbitrary and unlawful as an 'invasion of his privacy.' On brief he argues that his right is protected by 'the life, liberty and pursuit *1250 **315 of happiness guarantees which are fundamental in our free society.' But it is difficult for me to assume that our society is that 'free' or that such 'pursuit' remains private when the occasions involved the collaboration of his three fellow FBI employees in perfecting the arrangements. Then there was the relative whose apartment provided the locale in another instance. [FN7] And some other person-- if not one of those mentioned-- wrote a letter to the Bureau touching upon the situation, the explanation respecting which was supplied in detail by Carter himself. I would not have expected the term 'privacy' to have been so expansive. And to the extent that Bureau officials and finally the Director deemed the conduct unbecoming, Carter-- not the FBI-- had provided the cause for his dismissal.

FN7. Shortly thereafter, someone anonymously wrote to the Bureau tendering a complaint and expressing annoyance concerning the appellant's conduct. Such was the situation when a Special Agent interviewed Carter in the course of which Carter 'ventilated' the facts and presently wrote out and submitted his explanation which I have summarized.
News of such circumstances gets around, we may fairly assume.

It has been intimated that Carter could not have known the conduct deemed 'unbecoming an employee' was improper. His attorney writing to the Bureau in his behalf on September 13, 1965 seems to have been under no misapprehension. Counsel's letter stated, in part:

'The conduct deemed 'unbecoming' apparently was due to the fact that Mr. Carter had a young lady, whom he had known for some time and who had flown in from Texas to visit in Washington, in his apartment over night. Mr. Carter was questioned about this immediately after it occurred, and he

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himself told exactly what happened. His own statements, however, were used against him as on the basis of them he was discharged without notice and without being given the opportunity to resign.'

It has been suggested that the Handbook for FBI Employees is not sufficiently specific in pointing out that the Bureau can not tolerate personal misbehavior of its employees 'reflecting unfavorably upon them or the Bureau.' It is true that the Handbook does not say that an FBI employee may not use profane and obscene language in denouncing his superiors in the presence of others. A fingerprint clerk is not enjoined against mocking or vilifying a police officer who brings in a 'lifted' fingerprint for classification in furtherance of cooperation with the Bureau. Myriad examples of unspecified misbehavior will suggest themselves. Something is lacking, it is argued, in that the Handbook did not particularize with respect to any such illustration, or by way of denouncing the very conduct under discussion here, admitted by Carter who 'told exactly what happened.' If an employee of the Bureau did not know that he was expected to comply satisfactorily with 'ordinarily accepted standards of personal conduct,' [FN8] I would suppose he did belong in the Bureau in the first place. [FN9] Were I required to do so, I would rule that the Director had ample cause for dismissing Carter.

FN8. Handbook Veterans Assistance Program of the Selective Service System as referenced in Kemp v. John Chatillon & Sons, 169 F.2d 203, 207 (3 Cir. 1948); and see id. 206, quoting Judge Minton in defining 'cause' to be such 'as a fair minded person may act upon,' and n. 6 pointing out that Judge Minton when a Senator had been one of the managers of the vary legislation here considered.

FN9. Perhaps that is what the Director concluded, too.

Taking the facts disclosed on this record by Carter and his roommates, even without recourse for present purposes to the affidavits of other Bureau employees, I do not agree that this appellant, whether or not 'red blooded' (as his counsel puts it), is entitled to reversal. He does not seek reinstatement. This court should decline relief rather than award the appellant an opinion that his admitted conduct is to be the subject of a *1251 **316 trial to be judged by community standards as to permissible limits of heterosexual activity. I would dismiss the appeal.

Suppemental Opinion

*1252 DANAHER, Circuit Judge (dissenting):

In my dissent from the original opinion, I had already sought to make clear my view that the case was being decided erroneously. I now observe only that nothing presently said seems to establish a firmer foundation for the position reached by the majority. Rather, the Supplemental Opinion serves to reemphasize the existence of areas respecting which we should have the benefit of oral argument.

I would grant the Government's petition for rehearing.

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*58 140 L.R.R.M. (BNA) 2446, 121 Lab.Cas. P 10,174

James G. COLE, Plaintiff-Appellee,
v.
Dr. Richard B. SWINT, Defendant-Appellant.

No. 91-4779
Summary Calendar.
United States Court of Appeals,
Fifth Circuit.
March 27, 1992.

Former ranch foreman who was terminated when he was unable to work on a Saturday because of an Army National Guard commitment brought suit against employer under the Veterans Reemployment Rights Act. The United States District Court for the Eastern District of Texas, Paul N. Brown, J., awarded foreman $4,800 plus interest and required employer to pay costs. Employer appealed. The Court of Appeals held that: (1) evidence supported conclusion that employer fired ranch foreman for his absence of work on weekend because foreman told employer about his need to go on a weekend drill with the Army National Guard, and (2) Veterans Reemployment Rights Act's coverage is not restricted based upon business size.

Affirmed.

1. ARMED SERVICES k114(2)
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k114 Statutory Provisions
34k114(2) Liberal construction.

The Veterans Reemployment Rights Act is to be liberally construed for benefit of reservists and guardsmen. 38 U.S.C.A. Sec. 2021 et seq.

2. ARMED SERVICES k122(5)
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k122 Actions or Proceedings for Enforcement
34k122(5) Weight and sufficiency of evidence.

Evidence supported district court's conclusion that employer fired ranch foreman for his absence of work on weekend because foreman told employer about his need to go on a weekend drill with the Army National Guard, despite testimony of employer that he believed foreman's statement to mean that he had decided to pursue another career, in the Army; foreman testified that he had told employer accurately that he had joined the Guard and needed Saturday off for his drill. 38 U.S.C.A. Sec. 2021(b)(3).

3. ARMED SERVICES k119
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k119 Change of circumstances.

Employer, who had already hired someone to take foreman's place living on ranch, did not establish change in circumstances making it unreasonable and impossible to rehire employee after firing him based on his need to have a Saturday off for Army National Guard commitment. 38 U.S.C.A. Sec. 2021(a)(1)(B).

4. ARMED SERVICES k119
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k119 Change of circumstances.

Exemption from employer's duty to rehire reservist, for when circumstances have so changed as to make it impossible or unreasonable, has purpose of allowing employers who have eliminated reservist's position or otherwise drastically changed their business to avoid rehiring someone for job that no longer exists; mere replacement of employee does not exempt employer from rehiring duty. 38 U.S.C.A. Sec. 2021(a)(1)(B).

5. ARMED SERVICES k116
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k116 Employers obligated.

Veterans Reemployment Rights Act's coverage is not restricted based upon business size. 38 U.S.C.A. Sec. 2021 et seq.

6. ARMED SERVICES k115(7)
34 ----

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34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k115 Veterans Entitled
34k115(7) Leaving position for training or service.

There is no implied reasonableness requirement under the Veterans Reemployment Rights Act with regard to the time of the requested leave. 38 U.S.C.A. Sec. 2021 et seq.

7. ARMED SERVICES k115(4)
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k115 Veterans Entitled
34k115(4) Temporary employment or position.

Ranch foreman's position was not a "temporary position" so as to preclude him from having reservist rights under the Veterans Reemployment Rights Act, based upon his working for the Army National Guard; foreman had written employment contract, was paid monthly salary for full-time employment, and lived on ranch, and, when he was terminated, employer hired replacement. 38 U.S.C.A. Sec. 2021 et seq.

*59 Bryce J. Denny, Lawrence, McNally & Cooper, Tyler, Tex., for defendant-appellant.

Steven M. Mason, Asst. U.S. Atty., Bob Wortham, U.S. Atty., for plaintiff-appellee.

Appeal from the United States District Court for the Eastern District of Texas.

Before GARWOOD, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:

Dr. Richard B. Swint appeals from the district court's judgment that he is liable under the Veterans Reemployment Rights Act, 38 U.S.C. Sec. 2021 et seq., for his termination of and failure to rehire James G. Cole. Finding no error, we affirm.

I.

Swint is a dermatologist practicing in Paris, Texas. Since 1973 he has also been a ranch operator. At the time of the events at issue here, Swint had two full-time ranch employees: Levi Rian and James Cole. Cole worked as a foreman and lived at the ranch. He was compensated at a rate of $600 a month plus housing.

Viewed in the light most favorable to the district court's verdict, the circumstances surrounding Cole's termination were as follows. In August 1986, Cole enlisted in the Army National Guard. His initial active duty training was scheduled for October. He learned, however, around August 6 or 7, that he was required to drill with his Guard Unit on the following weekend. On Friday, August 8, Cole asked Swint for Saturday off in order to participate in the drill. Swint stated that this could create a problem and terminated Cole's employment as of the end of the workday August 8.

When Cole returned from his drill on Monday, Swint began negotiating with Cole to resolve the issue of Cole's accrued surplus hours in light of his termination. Swint proffered a draft severance agreement which Cole did not sign. Swint denied at trial that he had terminated Cole on the 8th, but the district court found this testimony incredible because of a handwritten note by Swint indicating that Cole was informed of his termination on August 8.

Because he no longer had a job, Cole moved up the start of his basic training and successfully completed it. On the advice of the Department of Labor, Cole sent Swint a letter upon completion of his training requesting reinstatement. Swint wrote back indicating that Cole's job had already been filled. Cole remained unemployed from February 1987 through August 1987.

II.

[1] The Act provides that an employee shall not be denied retention in employment or reemployment because of any obligation as a member of a reserve component of the armed forces. 38 U.S.C. Sec. 2021 (b)(3). The statute is to be liberally construed for the benefit of reservists and guardsmen. Coffy v. Republic Steel Corp., 447 U.S. 191, 100 S.Ct. 2100, 2104, 65 L.Ed.2d 53 (1980). The district court found that Cole had proven that he was terminated from his employment on Swint's ranch because of his service in the military reserves. The court awarded Cole $4800 plus interest and required Swint to pay costs.

[2] Swint argues first on appeal that the district

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court clearly erred in rejecting his assertion that Cole had voluntarily resigned his position at the ranch. He claims that Cole told him that "he was joining the Army" and that Swint believed that to mean he had decided to pursue another career. The district court disbelieved Swint's testimony about his conversation with Cole concerning his need to go on a weekend drill. Cole testified that he told Swint accurately that he had joined the Army National Guard and he needed Saturday off for his drill. There is nothing in this record to indicate that the district *60. court clearly erred in concluding that Swint fired Cole for his absence from work that weekend.

[3][4] Second, Swint argues that he had no duty to reemploy Cole because it would be unreasonable and impossible to do so. An employer may be excused from the duty to rehire where "the employer's circumstances have so changed as to make it impossible or unreasonable" to rehire the reservist. 38 U.S.C. Sec. 2021(a)(1)(B). Swint argues that the fact that he had already hired someone else to take Cole's place living on the ranch was a change in circumstance exempted under the Act. This argument is obviously without merit. The purpose of the exemption is to allow employers who have eliminated a reservist's position or otherwise drastically changed their business to avoid rehiring someone for a job that no longer exists. If mere replacement of the employee would exempt an employer from the Act, its protections would be meaningless.

[5] Third, Swint argues that the Act does not apply to small or "casual" employers. The Act does not have a threshold business size for coverage, unlike many other acts which incorporate such limiting provisions such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e et seq. Swint offers no support for this argument other than those already asserted in his argument about the impossibility of reemploying Cole. We see no need to imply a restriction on the Act's coverage based upon business size.

[6] Fourth, Swint argues that the district court clearly erred in finding that Cole requested a reasonable leave of absence. This argument is contrary to the weight of the evidence, which demonstrated that Cole asked Swint if he could have Saturday off for his drill. Swint also argues that there is a reasonableness requirement for the time of the requested leave itself. The Supreme Court has recently rejected the implication of a reasonableness requirement. King v. St. Vincent's Hospital, --- U.S. ----, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991) (overruling Lee v. City of Pensacola, 634 F.2d 886 (5th Cir.1981)). Accordingly, an argument based upon the reasonableness of the leave requested must fail.

[7] Finally, Swint argues that Cole held a temporary position and therefore was not entitled to reemployment rights. This argument is patently frivolous. Cole had a written employment contract, was paid a salary per month for full-time employment, and lived on Swint's ranch. Moreover, as soon as Cole was terminated, Swint hired a replacement. These facts are flatly inconsistent with Swint's assertion that this was a temporary and transient need which was filled with casual employment.

Having found no error in the judgment of the district court, we affirm.

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DAVIS v. GENERAL ACCIDENT FIRE & LIFE ASSUR. CORPORATION, Limited.

No. 3398.

Court of Civil Appeals of Texas. Beaumont.

April 14, 1939.

Rehearing Denied April 26, 1939.

1. Workmen's compensation ⇐235

An "employer" or "master" is one who employs another to perform service in his affairs and who controls, or has the right to control, the physical acts of the other in the performance of the service.

[Ed. Note.—For other definitions of "Employer" and "Master," see Words & Phrases.]

2. Workmen's compensation ⇐235

A "servant" or "employee" is a person employed by the master or employer to perform service in his affairs and whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.

[Ed. Note.—For other definitions of "Employee" and "Servant," see Words & Phrases.]

3. Workmen's compensation ⇐306

An "independent contractor" is one who contracts with another to perform some service for him, but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking.

[Ed. Note.—For other definitions of "Independent Contractor," see Words & Phrases.]

4. Workmen's compensation ⇐340

One who was employed by newspaper publishing company under a contract providing that he should deliver newspapers in his truck to distributors in neighboring towns, pay his own transportation expense, and employ such help as he should desire, was, under terms of contract, an "independent contractor," as respects recovery under the Workmen's Compensation Act unless the company actually did exercise control over him. Vernon's Ann.Civ.St. art. 8306 et seq.

5. Workmen's compensation ⇐340

That one employed by newspaper publishing company to deliver newspapers to distributors in his truck in neighboring towns was required to appear at company's office at certain time each day to receive newspapers, that his route of travel was designated and schedule for deliveries given, that he was required to file a daily driver's report, and that on some instances he was given specific instructions, did not indicate the exercise of such control by the company as would create a master and servant relationship so as to entitle alleged employee to recover compensation for injuries sustained when his truck struck a tree. Vernon's Ann.Civ.St. art. 8306 et seq.

6. Workmen's compensation ⇐308

An employer has the right to exercise such control over an independent contractor as is necessary to secure the performance of the contract according to its terms and to accomplish the results contemplated by the parties in making the contract, without thereby creating the relation of master and servant.

7. Workmen's compensation ⇐340

That newspaper publishing company, which employed individual to deliver newspapers in his truck to distributors in other towns, required him to carry and deliver bread and milk for other companies on his route, did not give rise to the relation of master and servant so as to entitle him to recover under the Compensation Act for injuries sustained when his truck ran into a tree. Vernon's Ann.Civ.St. art. 8306 et seq.

8. Workmen's compensation ⇐340

The fact that one who was employed by newspaper publishing company to deliver its newspapers to distributors in neighboring towns refused to permit him to carry the newspaper of a rival company, did not give rise to a master and servant relationship, so as to entitle him to recover under the Compensation Act for injuries sustained when his truck struck a tree. Vernon's Ann.Civ.St. art. 8306 et seq.

9. Workmen's compensation ⇐717

One who was employed by newspaper publishing company to deliver newspapers in his truck to distributors in certain towns, who also delivered milk and bread, and who was injured when his truck ran into a tree long after he had finished delivering the newspapers and was returning, did not receive compensable injuries "arising out of and in course of employment" by the newspaper publishing company. Vernon's Ann. Civ.St. art. 8306 et seq.

[Ed. Note.—For other definitions of "Arising Out of Employment" and

"Course of Employment," see Words & Phrases.]

10. Workmen's compensation ⇐717

Though, ordinarily, if an employee is sent on a mission by his master, he is considered an "employee" while returning, if he does not step aside from his employment and engage in some enterprise for his personal profit or pleasure, and is entitled to compensation if injured while on the return trip, yet if the employee turns away from his employment and engages in some act not in the usual course of his employment, and while so doing is injured, he cannot recover compensation. Vernon's Ann.Civ.St. art. 8306 et seq.

Appeal from District Court, Jefferson County; R. L. Murray, Judge.

Suit under the Workmen's Compensation Act by E. E. Davis, claimant, to set aside an award of the Industrial Accident Board in favor of the Enterprise Company, employer, and the General Accident Fire & Life Assurance Corporation, Limited, compensation carrier. From a judgment denying relief, the claimant appeals.

Judgment affirmed.

Howth, Adams & Hart and Mike Daughtry, all of Beaumont, for appellant.

Orgain, Carroll & Bell, of Beaumont, for appellee.

O'QUINN, Justice.

This case arose under the Workmen's Compensation Law. Vernon's Ann.Civ.St. art. 8306 et seq. The Enterprise Company, a corporation, was the employer, E. E. Davis the employee, and the General Accident Fire & Life Assurance Corporation, Ltd., the compensation insurance carrier. From an order of the Industrial Accident Board refusing appellant compensation he brought this suit to set aside the award and to recover compensation.

The case was tried to a jury, but the court instructed a verdict for appellee upon which judgment was rendered, and from which judgment appellant brings this appeal.

Appellant contends that the court erred in giving an instructed verdict for appellee because, under the undisputed evidence he was not an independent contractor, but was an employee of The Enterprise Company, covered by the compensation insurance carried by appellee, and so entitled to recover.

The Enterprise Company is a corporation engaged in printing a daily paper, the Enterprise, and circulating it through a territory covering several counties in East Texas. In furtherance of this, on February 3, 1936, it entered into the following written contract with appellant, to-wit:

"Contract and Agreement.

"This contract and agreement made and entered into this the 3rd. day of February, 1936, by and between The Enterprise Company, a corporation, hereinafter styled First Party, and E. E. Davis hereinafter styled Second Party, witnesseth:

"In consideration of the work to be performed or caused to be performed by Second Party as set out herein, First Party agrees to pay to Second Party the sum of $30.00 per week.

"Second Party agrees to procure from First Party at a place or places and at times agreed upon by the parties hereto, newspapers published by First Party and deliver the same along a route or routes as follows:

"Papers for Beaumont to Lufkin and intermediate points; said papers to be picked up at Beaumont, and distributed to the distributor's places of business in the towns above mentioned, all of said papers to be conveyed by automobile, leaving Beaumont upon receipt of papers immediately after delivery to Second Party each day and carried to destinations immediately and at such rate of speed as to comply with the law.

"Second Party is to provide at his own expense such transportation and help as in his opinion he may need for deliveries of said papers and shall manage and conduct said route above designated in such manner as shall be for the best interest of First Party; Second Party to have full power to employ and discharge any or all assistants needed by him.

"Second Party agrees at all times to hold First Party harmless from any action, cause, causes of action, damages, costs, expenses, claims or demands whatsoever in law or in equity, which may arise from or grow out of or in any way be incident to the work or to be performed hereunder by Second Party, his employees or agents; it being expressly agreed that Second Party occupies at all times the position of an independent contractor and controlls all ways and means relating to the proper perform-

ance and completion of this contract; First Party looking to Second Party to obtain the desired results as herein set out.

"It is also agreed by the parties hereto that either party may terminate this contract by giving to the other party three days notice in writing of the desire of said party to so terminate the same.

"Witness the hands of the parties hereto, this the 3rd. day of February, 1936.

"The Enterprise Company
"By L. E. Gillett First Party
"E. E. Davis Second Party."

Under this contract, appellant secured a new Ford panel truck and began his services for The Enterprise Company. When he reported to L. E. Gillett, circulation manager for the Enterprise, he was advised as to the route he was to follow and what he was expected to do in discharge of his part of the contract. He was to report at the office of The Enterprise in the City of Beaumont daily at 11:45 P. M. to receive the papers he was to deliver. He then began his daily round delivering packages of papers at points between Beaumont and Keltys along what is known as the Beaumont-Lufkin highway. He had a schedule of time to go by, arriving at Keltys, the most northern point, at 5:30 A. M. He was required to make the intermediate points at schedule times. He was furnished printed slips called "drivers reports" upon which he was to note the exact time at which he passed each of the places where he was required to deliver papers to agents of The Enterprise Company, and if he was late at any of them he was required to state on the report slip the cause of being late. These report slips he was required to file at the Enterprise office each evening at 11:45 when he reported for another day's supply of papers to be delivered. The contract nor the oral instructions given him by Gillett in no way referred to his return trip from Keltys when he had concluded the day's delivery of papers at 5:30 A. M. He could make the return in his own way, only he was required to be at the office at 11:45 P. M. to file his report and receive papers for the next deliveries. He was allowed to solicit new subscribers for the paper along the route, but he received special compensation for this of 37½ cents for each such new subscriber per month he secured. He received $30 per week for transporting and delivering the papers to agents of the Enterprise on the route. If he, for any reason, was late in reporting to the office, he was called in for explanation, and was told that it was very important, if he kept the job, to be promptly on time and when he overslept and was late, there was deducted from his pay one dollar for each time he was late. The Enterprise collected from its agents at the various points of delivery for the papers furnished them, but occasionally when one of the agents was derelict in remitting for his papers, appellant was instructed to call the agent's attention and inform him that unless he remitted for the papers his papers would be discontinued. When appellant arranged with Gillett for the contract to carry the papers, he was told by Gillett that there was an arrangement between The Enterprise Company and the Texas Bread Company that the man who carried the papers on the route must carry the Texas Bread Company's bread and sell it along the route. For this the bread company was to pay the paper carrier a commission on the bread sales that would average around $30 per week. Appellant agreed to this and carried the bread and collected his pay. He was also informed that by arrangement between The Enterprise Company and Spears Dairy he was to carry Spears' milk and dispose of it along the route, for which it would pay $9 per week. He agreed to this and carried the milk and received the pay.

On September 4, 1936, while on his return trip after delivering all the papers he was required to deliver on that day's trip, appellant, when at or near Rosedale a few miles out from Beaumont, suffered severe injuries when his truck collided with a tree on the edge of the highway. This was about 1:30 to 2:30 in the afternoon. He testified that he must have gone to sleep as to the cause of the collision with the tree. He filed his claim for compensation with the Industrial Accident Board, which after full hearing was refused. In due time he filed this suit to set side this award and to recover compensation.

[1-3] Was, as contended by appellee, Davis an independent contractor, if so, then the judgment must be sustained. The employer, or master, is one who employs another to perform service in his affairs and who controls or has the right to control the physical acts of the other in the performance of the service. The servant, or employee, is a person employed by the

master or employer to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master. An independent contractor is one who contracts with another to perform some service for him, but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking.

[4] The written contract above set out does not give the employer the control or the right to control with respect of Davis' physical conduct, or that of his employees, in the performance of the work provided for in the contract. In fact it provides that Davis shall employ his own help and shall control all ways and means relating to the proper performance and completion of the work provided for in the contract. Clearly under the express terms of the written contract, Davis was an independent contractor. Carter Publications v. Davis, Tex.Civ.App., 68 S.W.2d 640, and authorities cited at page 642, Writ denied. The cited case grew out of a contract to deliver papers on a prescribed route, identical in terms with the contract here involved and was very similar on the facts. Judgment for plaintiff there was reversed and rendered, and as shown, writ of error was refused. This case was cited by the Supreme Court with approval in Lehr v. Brown, 127 Tex. 236, 91 S.W.2d 693.

[5, 6] Appellant insists that there was evidence sufficient to show that The Enterprise Company did assume and exercise control over him with reference to performance of the contract, even though the written contract did not so provide, and hence he was an employee of The Enterprise Company. These incidents are urged to sustain this contention: appellant was required to appear at the Enterprise office at 11:45 P. M. to receive the papers to be delivered, his route of travel was designated, the schedule for deliveries at the several places to agents was given, he must sign and file a "drivers report" each day showing times of arrival at the different places, and if late was required to explain why late, was sent for and fined one dollar a week if he failed to promptly report at 11:45 at night for the papers, was admonished that if he desired to retain his contract he must be punctual, that on one occasion the highway that he travelled on the route was practically impassable at one point and they told him what detour he must take to reach Lufkin (on the route) on time which he did, that on one occasion his truck refused to operate which he reported to The Enterprise, and they told him to come on and they furnished him another truck to use, and for which he was not charged. We do not think these matters indicated exercise of such control by the employer as to create the relation of master and servant. They merely evidenced that the employer was exercising that nature of control to see that the work was being performed and desired results accomplished according to the terms of the contract. It is well settled law that an employer has the right to exercise such control over an independent contractor as is necessary to secure the performance of the contract according to its terms and to accomplish the results contemplated by the parties in making the contract without thereby creating the relation of master and servant. 23 Tex.Jur. 547, Secs. 6-7; 14 R.C.L. 68, Secs. 4-5; Carter Publications v. Davis, Tex.Civ.App., 68 S.W.2d 640; Lehr, Inc. v. Brown, 127 Tex. 236, 91 S.W.2d 693; Southern Surety Co. v. Scheel, 125 Tex. 1, 78 S.W.2d 173; Smith Bros. v. O'Bryan, 127 Tex. 439, 94 S.W.2d 145; Security Union Ins. Co. v. McLeod, Tex.Com.App., 36 S.W. 2d 449; Traders & General Ins. Co. v. Jones, Tex.Civ.App., 95 S.W.2d 189.

[7, 8] But appellant says that as The Enterprise Company required him to carry and deliver bread for the Texas Bread Company, and milk for the Spears Dairy on his route, that this caused his status to be that of an employee of The Enterprise Company. We think the contention is without force. When appellant first learned of the opportunity to obtain the employment, he was in Arkansas. He communicated with L. E. Gillett, circulation manager for the Enterprise, and was informed that the opportunity for the contract was open and that it paid around $70 per week. He then came to Beaumont and met Gillett. Gillett told him that The Enterprise would pay $30 per week for delivering the papers, and that The Enterprise Company had an arrangement for the paper carrier to deliver bread for the Texas Bread Company, for which it would pay a commission averaging about $30 per week, and also had an arrangement with Spears Dairy to deliver its

milk on the route for which it would pay $9 per week. This was about $70 per week that the carrier would receive for his services. He agreed to this arrangement and entered upon the work. He delivered bread for the Texas Bread Company at the CCC camp at Woodville for the first month, and then the Fehr Baking Company underbid the Texas Bread Company and got the bread contract for the next month. He was not permitted to carry the bread for the Fehr Bread Company for the reason that The Enterprise had made an agreement with the Texas Bread Company that its carrier would not carry any other bread. He delivered the milk to the CCC camp also. In his deliveries of the bread and milk he testified that he was acting solely under the instructions and agreement with the bread company and the dairy company; that he considered that he was then their employee and not an employee of The Enterprise Company. It thus appears that appellant was performing under three contracts, each independent of the other. He further contends that the management of the Houston Chronicle, a daily paper published at Houston, Texas, sought to get him to carry its paper on his route and dispose of same and The Enterprise Company refused him permission to do so, and that this act constituted him an employee of The Enterprise Company. This contention is without force. The Enterprise Company was engaged in building up its own circulation and entered into the contract with appellant for that sole purpose. The Chronicle was an active competitor in the territory, and to have permitted its circulation by appellant would have greatly diminished and retarded the success of the undertaking contemplated when the contract with Davis was made. Furthermore, The Enterprise Company was engaged solely in the publishing and circulation of a newspaper, and not in manufacturing and selling bread, nor in producing and selling milk, and such was not in the course of its usual and customary business. In the performance of his duties to the bread company and the dairy company, he could not have been an employee of The Enterprise Company in contemplation of the Compensation law.

[9, 10] However, if it could be said that appellant was, under the facts, an employee of The Enterprise Company, then we think the judgment must be affirmed for the reason that, in our opinion, when appellant received his injuries he was not in the course of his employment in his master's business. In other words that the injuries sustained by appellant were not of such character as had to do with and originated in the employer's trade, business or profession, for in that appellant was not then engaged in the discharge of any duty he owed to The Enterprise Company. Appellant's whole duty to The Enterprise Company related to his delivery and distribution of its paper, the Enterprise, along and on the route extending from Beaumont to Keltys covering the highway from Beaumont to Lufkin. Keltys was just out of Lufkin on the north end of the route. Appellant was to and did reach Keltys at 5:30 A. M., where and when his duty ended for the day as to the distribution of the papers. He was not required to return to Beaumont at any hour prior to 11:45 P. M. when he reported his day's work and received the papers for the next day's delivery. His time was his own in so far as the paper work was concerned. But he then began the principal work to be performed by him for the bread company and the dairy company. He testified that he delivered the milk at the CCC camp at Woodville on his outbound trip in the early morning that the men might have it for the breakfast meal. He also delivered bread for that purpose. When he began his return trip he then actively sought to dispose of the bread given him for that purpose at the different places along the route, collected for the bread and made out a report of the bread sold, and when he reached Beaumont made his report to the bread company. On his return trip he took up empty milk bottles to return them to the Dairy and made his report to the Dairy together with receipts he was required to get for the milk delivered, and on reaching Beaumont reported to the Dairy, and received the milk supply for the next trip. He was on the return trip when he received his injuries, somewhere about 1:30 or 2:30 P. M., some 1½ or 2½ miles north of Beaumont, at Rosedale. He was not required to report at The Enterprise office until 11:45 that night when he reported his day's trip and received the papers for the next day's deliveries. Since leaving Keltys and Lufkin shortly after 5:30 A. M. he had not been doing and was not required to do any act in the furtherance of his contract

to deliver the papers, but his whole activities were in the discharge of his duties and undertaking for the Texas Bread Company and the Spears Dairy. At the time he was injured he had in his truck the bread boxes—containers—to be delivered to the bread company, and the empty bottles he was returning to Spears Dairy. He would obtain the bread and the milk for the next trip and then report at The Enterprise Company office at 11:45 P. M. It is clear, we think, that he had departed from his duties to The Enterprise Company and was engaged in matters foreign to any duty he owed it, and was engaged in matters solely for his own benefit at the time he received his injuries. He testified:

"Q. Now then, when you went to deliver your papers, Mr. Davis, the last delivery I believe you had was at Keltys, wasn't it? A. Yes, sir.

"Q. The requirement was you would deliver them all on the journey going up, rather than coming back, wasn't it? The Enterprise required you to do that? A. Yes, sir.

"Q. Then when you got to Keltys and put the papers out there, on your return trip you wouldn't—you would have completed all your deliveries, of course, on the papers themselves, wouldn't you? A. Yes, sir."

It is thus seen that appellant when he was injured was not in the course of his employment with The Enterprise Company, and that his injuries did not have to do with, nor did they originate in the employment of The Enterprise Company. While the rule is ordinarily to the effect that if an employee is sent on a mission by his master, that he is considered an employee while returning, if he does not step aside from his employment and engage in some enterprise for his personal profit or pleasure, and would be entitled to compensation if injured while on the return trip, but if the employee turns away from the course of his employment and engages in some act not in the usual course of his employment, and while in so doing he is injured, then he cannot recover. It is too clear for cavil that when appellant made his last delivery of papers at Keltys at 5:30 A. M. and began his return trip and while en route engaged in the sale of bread for the Texas Bread Company, and collecting empty milk bottles for return to the Spears Dairy, he was not then in the discharge of any duty he owed to The Enterprise Company, and was not performing any act in the usual course of his employment with said company, and so not entitled to recover. Southern Casualty Co. v. Ehlers, Tex.Civ.App., 14 S.W. 2d 111; Smith v. Texas Employers' Ins. Ass'n, 129 Tex. 573, 105 S.W.2d 192; Article 8309, Subd. 1.

What we have said disposes of the case, and it follows that the judgment should be affirmed, and it is so ordered. Affirmed.

In concurring in the affirmance of the judgment of the lower court, Judge Walker reserves his conclusion on the issue of "independent contractor".

*1105 328 U.S. 275, 167 A.L.R. 110, 90 L.Ed. 1230

FISHGOLD
v.
SULLIVAN DRYDOCK & REPAIR CORPORATION et al.

No. 970.
Argued May 6, 1946.
Decided May 27, 1946.

Suit by Abraham Fishgold against the Sullivan Drydock & Repair Corporation under the Selective Training and Service Act to obtain a declaratory judgment as to plaintiff's rights under the act and to recover compensation for the days he was not allowed to work, wherein Roy Granata, as acting president and acting treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C.I.O., intervened. The District Court refused the declaratory judgment requested, but entered a money judgment for plaintiff for loss of wages, 62 F.Supp. 25, and the Union appealed to the Circuit Court of Appeals. To review the judgment of the Circuit Court of Appeals, 154 F.2d 785, reversing the District Court's judgment, the plaintiff brings certiorari.

Affirmed.

Mr. Justice BLACK dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

1. FEDERAL COURTS k544
170B ----
170BVIII Courts of Appeals
170BVIII(B) Appellate Jurisdiction and Procedure in General
170Bk543 Right of Review
170Bk544 Particular persons.

Formerly 106k405(13)

U.S. 1946.

Where honorably discharged veteran brought action under the Selective Service Act against his employer for declaratory relief and for compensation for days he was not allowed to work but non-veterans with seniority were permitted to work and union, having a collective bargaining agreement with employer providing that seniority shall be controlling when ability of employees is fairly equal, intervened, union had an appealable interest in district court's judgment denying veteran declaratory relief but granting a money judgment, since district court's judgment necessarily involved a construction of the collective bargaining agreement that would be binding under doctrine of res judicata if union should thereafter institute a suit for interpretation of the agreement. Selective Training and Service Act of 1940, Sec. 8(b), 50 U.S.C.A.Appendix, Sec. 308(b); Fed.Rules Civ.Proc. rule 24(b), 28 U.S.C.A.

2. JUDGMENT k713(2)
228 ----
228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k713 Scope and Extent of Estoppel in General
228k713(2) Matters which might have been litigated.

U.S. 1946.

A judgment on the merits is a finality as to claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

3. FEDERAL CIVIL PROCEDURE k2727
170A ----
170AXIX Fees and Costs
170Ak2726 Result of Litigation
170Ak2727 Prevailing party.

Formerly 106k357

U.S. 1946.

The allowance of costs to the prevailing party is not a rigid rule. Federal Rules of Civil Procedure, rule 54(d), 28 U.S.C.A. following section 723c.

4. ARMED SERVICES k114(1)
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k114 Statutory Provisions
34k114(1) In general.

Formerly 106k357

U.S. 1946.

The Selective Service Act was designed to protect

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the veteran by preventing him from being penalized on his return by reason of his absence from his civilian job and by giving him an advantage which the law withheld from those who stayed behind. Selective Training and Service Act of 1940, Sec. 8(b, c), as amended, 50 U.S.C.A.Appendix, Sec. 308(b, c).

5. ARMED SERVICES k114(2)
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k114 Statutory Provisions
34k114(2) Liberal construction.

Formerly 106k357

U.S. 1946.
The Selective Service Act is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. Selective Training and Service Act of 1940, Sec. 1 et seq., 50 U.S.C.A.Appendix, Sec. 301 et seq.

6. ARMED SERVICES k114(2)
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k114 Statutory Provisions
34k114(2) Liberal construction.

Formerly 106k357

U.S. 1946.
The separate provisions of the Selective Service Act are construed as parts of an organic whole and each is given as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits. Selective Training and Service Act of 1940, Sec. 1 et seq., 50 U.S.C.A.Appendix, 301 et seq.

7. ARMED SERVICES k118(1)
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k118 Position Restorable
34k118(1) In general.

Formerly 106k357

U.S. 1946.
Provisions of Selective Service Act restoring a veteran to his former position or to a "position of like seniority," or directing that he shall be so restored without loss of "seniority", guarantee a veteran against loss of position or seniority for absence and count his service in the armed forces as service in the plant, but no step-up or gain in priority can be fairly implied. Selective Training and Service Act of 1940, Sec. 8(b, c) as amended, 50 U.S.C.A.Appendix, Sec. 308(b, c).

See publication Words and Phrases for other judicial constructions and definitions.

8. ARMED SERVICES k118(4)
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k118 Position Restorable
34k118(4) Seniority.

U.S. 1946.
The provision of the Selective Service Act guaranteeing a veteran against discharge from his position without cause within one year after restoration does not grant the veteran a step-up in seniority over what he would have had if he had not entered the service, since the seniority problem is not in terms dealt with by that provision, but by preceding provisions. Selective Training and Service Act of 1940, Sec. 8(c), as amended, 50 U.S.C.A.Appendix, Sec. 308(c).

9. ARMED SERVICES k120
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k120 Discharge.

U.S. 1946.
The provision of the Selective Service Act guaranteeing a veteran against discharge from his position without cause within one year after restoration is broad enough to cover demotions, and if, within statutory period, veteran is demoted, he is within meaning of the act "discharged" from such position. Selective Training and Service Act of 1940, Sec. 8(c), as amended, 50 U.S.C.A.Appendix, Sec. 308(c).

See publication Words and Phrases for other judicial constructions and definitions.

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10. ARMED SERVICES k120
34 ---
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
*1105 34k120 Discharge.

U.S. 1946.

Welder who, after honorable discharge from army, was restored to his former position, was not entitled to recover from his employer for days when he was laid off while non-veterans with higher seniority were allowed to work, since a "lay-off" is not a "discharge" within meaning of provision of the Selective Service Act that a veteran shall not be discharged without cause within one year after restoration to his position. Selective Training and Service Act of 1940, Sec. 8(b, c), as amended, 50 U.S.C.A.Appendix, Sec. 308(b, c).

See publication Words and Phrases for other judicial constructions and definitions.

11. ARMED SERVICES k120
34 ---
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k120 Discharge.

U.S. 1946.

"Discharge", within meaning of provision of the Selective Service Act that a veteran shall not be discharged without cause within one year after restoration to his position, means termination of the employment relationship or loss of a position and does not refer to one who has been laid off by operation of a seniority system and put on a waiting list for reassignment. Selective Training and Service Act of 1940, Sec. 8(c), as amended, 50 U.S.C.A.Appendix, Sec. 308(c).

12. ARMED SERVICES k120
34 ---
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k120 Discharge.

U.S. 1946.

A "furlough" and a "leave of absence" as used in the Selective Service Act are forms of "lay-off," and are not "discharges" within meaning of provision of the act that a veteran shall not be discharged without cause within one year after restoration to his position. Selective Training and Service Act of 1940, Sec. 8(c), as amended, 50 U.S.C.A.Appendix, Sec. 308(c).

See publication Words and Phrases for other judicial constructions and definitions.

13. ARMED SERVICES k119
34 ---
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k119 Change of circumstances.

U.S. 1946.

Under the Selective Service Act, a veteran on his return is entitled to his old position or its equivalent even though at time of his application the plant is closed down, as for retooling, and no work is available, unless the employer's circumstances have so changed as to make it impossible or unreasonable to restore the veteran, and the veteran is entitled to be recalled to work in accordance with his seniority. Selective Training and Service Act of 1940, Sec. 8(b, c), as amended, 50 U.S.C.A.Appendix, Sec. 308(b, c).

14. ARMED SERVICES k118(1)
34 ---
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k118 Position Restorable
34k118(1) In general.

U.S. 1946.

Congress, in enacting the Selective Service Act, undertook to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of his employment relationship without cause for a year. Selective Training and Service Act of 1940, Sec. 8(b, c), as amended, 50 U.S.C.A.Appendix, Sec. 308(b, c).

15. ARMED SERVICES k113
34 ---
34III Veterans' Benefits
34III(A) In General
34k113 Re-employment.

U.S. 1946.

The rulings of the Director of Selective Service in construing the Selective Service Act may be resorted to by the courts for guidance, but his rulings, not

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having been made in adversary proceedings, are not entitled to the weight which is accorded interpretations by administrative agencies entrusted with the responsibility of making inter partes decisions. Selective Training and Service Act of 1940, Sec. 1 et seq., as amended, 50 U.S.C.A.Appendix, Sec. 301 et seq.

16. STATUTES k223.5(1)
361 ----
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.5 Re-Enactment of or Reference to Statute and Adoption of Provisions Previously Construed in General
361k223.5(1) Administrative construction.

Formerly 361k2253/4

U.S. 1946.

Ruling of the Director of Selective Service that the Selective Service Act required reinstatement of a veteran to his former position or one of like seniority, status, and pay, even though such reinstatement necessitated the discharge of a nonveteran with a greater seniority, was not followed by the Supreme Court, though Congress amended and extended the act after the ruling by the Director, in view of the language of the act and a different construction of the act by the National War Labor Board in handling of disputes arising out of a negotiation of collective bargaining agreements. Selective Training and Service Act of 1940, Secs. 8, 16(b), as amended, 50 U.S.C.A.Appendix, Secs. 308, 316(b).

The provision of the Selective Service Act guaranteeing a veteran against discharge from his position without cause within one year after restoration does not grant the veteran a step-up in seniority over what he would have had if he had not entered the service, since the seniority problem is not in terms dealt with by that provision, but by preceding provisions. Selective Training and Service Act of 1940, s 8(c), as amended, 50 U.S.C.A.Appendix, s 308(c).

The provision of the Selective Service Act guaranteeing a veteran against discharge from his position without cause within one year after restoration is broad enough to cover demotions, and if, within statutory period, veteran is demoted, he is within meaning of the act 'discharged' from such position. Selective Training and Service Act of 1940, s 8(c), as amended, 50 U.S.C.A.Appendix, s 308(c).

Welder who, after honorable discharge from army, was restored to his former position, was not entitled to recover from his employer for days when he was laid off while non-veterans with higher seniority were allowed to work, since a 'lay-off' is not a 'discharge' within meaning of provision of the Selective Service Act that a veteran shall not be discharged without cause within one year after restoration to his position. Selective Training and Service Act of 1940, s 8(b, c), as amended, 50 U.S.C.A.ppendix, s 308(b, c).

'Discharge', within meaning of provision of the Selective Service Act that a veteran shall not be discharged without cause within one year after restoration to his position, means termination of the employment relationship or loss of a position and does not refer to one who has been laid off by operation of a seniority system and put on a waiting list for *1105 reassignment. Selective Training and Service Act of 1940, s 8(c), as amended, 50 U.S.C.A.Appendix, s 308(c).

A 'furlough' and a 'leave of absence' as used in the Selective Service Act are forms of 'lay-off,' and are not cdischarges' within meaning of provision of the act that a veteran shall not be discharged without cause within one year after restoration to his position. Selective Training and Service Act of 1940, s 8(c), as amended, 50 U.S.C.A.Appendix, s 308(c).

Under the Selective Service Act, a veteran on his return is entitled to his old position or its equivalent even though at time of his application the plant is closed down, as for retooling, and no work is available, unless the employer's circumstances have so changed as to make it impossible or unreasonable to restore the veteran, and the veteran is entitled to be recalled to work in accordance with his seniority. Selective Training and Service Act of 1940, s 8(b, c), as amended, 50 U.S.C.A.Appendix, s 308(b, c).

Congress, in enacting the Selective Service Act, undertook to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of his employment relationship without cause for a year. Selective Training and Service Act of 1940, s 8(b, c), as amended, 50 U.S.C.A.Appendix, s 308(b, c).

The rulings of the Director of Selective Service in

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construing the Selective Service Act may be resorted to by the courts for guidance, but his rulings, not having been made in adversary proceedings, are not entitled to the weight which is accorded interpretations by administrative agencies entrusted with the responsibility of making inter partes decisions. Selective Training and Service Act of 1940, s 1 et seq., as amended, 50 U.S.C.A.Appendix, s 301 et seq.

*1107 [328 U.S. 277] Mr. John F. Sonnett, Asst. Atty. Gen., for petitioner.

Mr. J. Read Smith, of Brooklyn, N.Y., for respondent Sullivan Drydock & Repair Corporation.

Mr. M. H. Goldstein, of New York City, for respondent Roy Granata, etc.

Mr. Justice DOUGLAS delivered the opinion of the Court.

Petitioner is an employee of the Sullivan Drydock & Repair Corporation. He entered its employ in 1942 and [328 U.S. 278] worked for it at a shipyard until he was inducted into the Army in 1943. He served in the Army a little over a year and was honorably discharged and received a certificate to that effect. He had worked for the corporation as a welder and after his tour of duty in the Army ended, he was still qualified to perform the duties of a welder. Within forty days of his discharge, he applied to the corporation, as was his right under the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U.S.C.Appendix, s 301 et seq., 50 U.S.C.A.Appendix, s 301 et seq., for restoration to his former position. (FN1) *1108 He was reemployed as a welder on August 25, 1944.

[328 U.S. 279] The Corporation and Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America had a collective bargaining agreement which provided: (FN2)

'Promotions and reclassifications and increases or decreases in the working force shall be based upon length of service and ability to do the job. Wherever between two or more men, ability is fairly equal, length of service shall be the controlling factor.'

As work at the shipyard decreased, men would be laid off. The men selected by the foremen, on the basis of ability and seniority, to be laid off would report to a department head for reassignment on the basis of their relative seniority when work became available. On each of nine days in the spring of 1945 petitioner was laid off although other welders, not veterans of the recent war, possessing the same or similar skill as petitioner, were given work on those days. These men were preferred because they had a higher shop seniority than petitioner. The decision to lay off petitioner followed a decision of an arbitrator who ruled that the seniority provisions of the collective bargaining agreement, which we have quoted, required it and [328 U.S. 280] that they were not inconsistent with the provisions of the Selective Training and Service Act of 1940.

Thereupon petitioner brought this suit, pursuant to s 8(e) of the Act, (FN3) to obtain a *1109 declaratory judgment as to his rights under the Act and to obtain compensation for the days he was not allowed to work. The corporation answered, justifying its action by the provisions of the collective bargaining agreement and the decision of the arbitrator. The union was permitted to intervene. (FN4) It alleged in its answer that the action of the corporation was warranted by the provisions of the collective bargaining agreement and was not in violation of the Act. The District Court refused the declaratory judgment requested, [328 U.S. 281] but entered a money judgment for petitioner for the loss of wages during the nine days in question. 62 F.Supp. 25. It held that petitioner was laid off in violation of the Act. It was also of the view that the collective bargaining agreement was not inconsistent with the Act. Only the union appealed. The Circuit Court of Appeals reversed, one judge dissenting. 2 Cir., 154 F.2d 785. It held that the Act did not give petitioner the preference which he claimed and that the terms of the collective bargaining agreement justified the corporation's action. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.

I. We are met at the outset with the claim that the union had no appealable interest in the judgment entered by the District Court and accordingly that the Circuit Court of Appeals lacked jurisdiction to entertain it. It is pointed out that a money judgment was entered only against the corporation and that no relief was granted against the union. It is therefore argued that the judgment did not affect any substantive right of the union and that at most the union had merely an interest in the outcome of litigation which might establish a precedent adverse to it. Boston Tow Boat Co. v. United States, 321 U.S. 632, 64 S.Ct. 776, 88 L.Ed. 975. It is also pointed out that the

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statutory guarantee against discharge without cause for one year (FN5) had [328 U.S. 282] expired at the time of the District Court's judgment, that therefore no declaratory relief was granted, and that petitioner's rights for the future were not adjudicated. It is contended that the dispute between petitioner and the union has thus become moot.

[1][2] But that argument misses the point. The answer of the corporation and the union put in issue the question whether there was a conflict between the collective bargaining agreement and the Act and if so, which one prevailed. The parties to the collective bargaining agreement--the union and the corporation--were before the court. A decision on the merits of petitioner's *1110 claim necessarily involved a reconciliation between the Act and the collective bargaining agreement or, if it appeared that they conflicted, an adjudication that one superseded the other. As we have noted, the District Court was of the view that the collective bargaining agreement was not inconsistent with the Act. But, however the result might be rationalized, a decision for or against petitioner necessarily involved a construction of the collective bargaining agreement. That issue was adjudicated, with the union as a party. Hence if the union had thereafter instituted a separate suit for an interpretation of the agreement, it would be met with the plea of res judicata. And that plea would be sustained, for the prior decision was on the precise point which the union sought to relitigate and was adverse to the union. And both parties to the agreement--the union and the corporation--were parties to the prior suit. This elementary principle has long been recognized. Black, The Law of Judgments (2d ed.) pp. 764, 821, 936. As stated in Cromwell v. County of Sac, 94 U.S. 351, 352, 24 L.Ed. 195, a prior judgment 'is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter [328 U.S. 283] which might have been offered for that purpose.' And see Rooker v. Fidelity Trust Co., 263 U.S. 413, 415, 44 S.Ct. 149, 150, 68 L.Ed. 362; Grubb v. Public Utilities Commission, 281 U.S. 470, 479, 50 S.Ct. 374, 378, 74 L.Ed. 972; Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104; Chicot County Drainage Dept. v. Baxter State Bank, 308 U.S. 371, 375, 378, 60 S.Ct. 317, 319, 320, 84 L.Ed. 329. The case of Boston Tow Boat Co. v. United States, supra, would be relevant if the collective bargaining agreement in issue was one between different parties. (FN6) Then the union's interest would be merely the interest of one seeking reversal of an adverse precedent. And its 'independent right to relief' would not be increased by reason of its intervention in the cause. Alexander Sprunt & Son v. United States, 281 U.S. 249, 255, 50 S.Ct. 315, 317, 74 L.Ed. 832. But here the rights of the union and its members under a contract with the corporation were adjudicated in a proceeding in which the union was a party. The contract was still in existence at the time of the appeal. Hence the case was not moot. And the only way the union could protect itself against that binding interpretation of the agreement was by an appeal. For then the union found itself in the position where a right of its own (Alexander Sprunt & Son v. United States, supra, 281 U.S. page 255, 50 S.Ct. page 317, 74 L.Ed. 832) was adjudicated. (FN7)

[3] It is suggested, however, that the result of what we do is to free the union and the employer from costs and burden Fishgold with them. There are several answers to that. The allowance of costs has no bearing on what [328 U.S. 284] is or what is not res judicata. Their allowance to the prevailing party is not, moreover, a rigid rule. Under the Rules of Civil Procedure the court can direct otherwise. Rule 54(d). And finally, Congress has provided in s 8(e) of this Act that when a veteran applies to the District Court for the benefits of the Act 'no fees or court costs shall be taxed' against him.

[4] II. We turn then to the merits. The Act was designed to protect the veteran *1111 in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind.

These guarantees are contained in s 8 of the Act (FN8) and extend to a veteran, honorably discharged and still qualified to perform the duties of his old position. (1) He has a stated period of time in which to apply for reemployment. (FN9) s 8(b). He is not pressed for a decision immediately on his discharge but has the opportunity to make plans for the future and readjust himself to civilian life. (2) He must be restored to his former position 'or to a position of like seniority, status, and pay.' s 8(b)(A), (B). He is thus protected against receiving a job inferior to that which he had before entering the armed services. (3) He shall be 'restored without loss of seniority' and be considered 'as having been on furlough or leave of absence' during the period of his service for his

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country, with all of the insurance and other benefits accruing to employees on furlough or leave of absence. s 8(c). Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise [328 U.S. 285] point he would have occupied had he kept his position continuously during the war. (4) He 'shall not be discharged from such position without cause within one year after such restoration.' s 8(c).

Petitioner's case comes down to the meaning of this guarantee against 'discharge.' 'Discharge' is construed by him to include 'lay-off.' And it is earnestly argued that Congress could not have intended to restore the veteran to his position, prevent his discharge without cause for one year, and yet not intend that he perform actual work if it was available.

[5][6] This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. See Boone v. Lightner, 319 U.S. 561, 575, 63 S.Ct. 1223, 1231, 87 L.Ed. 1587. And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act. Our problem is to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.

[7] We can find no support for petitioner's position in the provision of s 8(b) which restores him to his former position or to a 'position of like seniority.' Nor can we find it in s 8(c) which directs that he 'shall be so restored without loss of seniority.' As we have said, these provisions guarantee the veteran against loss of position or loss of seniority by reason of his absence. He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence. But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services. [328 U.S. 286] We agree with the Circuit Court of Appeals that by these provisions Congress made the restoration as nearly a complete substitute for the original job as was possible. No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more.

[8][9][10] Nor can we read into the guarantee against discharge 'from such position' a gain or step-up in seniority. That guarantee does not in terms deal with the seniority problem. The problem of seniority is covered by the preceding provisions. ***1112** The guarantee against discharge 'from such position' is broad enough to cover demotions. The veteran is entitled to be restored to his old position or to a 'position of like seniority, status, and pay.' If within the statutory period, he is demoted, his status, which the Act was designed to protect, has been affected and the old employment relationship has been changed. He would then lose his old position and acquire an inferior one. He would within the meaning of s 8(c) be 'discharged from such position.' But the guarantee against discharge does not on its face suggest the grant of a preference to the veteran over and above that which was accorded by the seniority of 'such position.'

[11][12] Discharge normally means termination of the employment relationship or loss of a position. (FN10) In common parlance and in industrial parlance a person who has been laid off by operation of a seniority system and put on a waiting list for reassignment would hardly be considered [328 U.S. 287] as having been 'discharged'. (FN11) There are three terms used in s 8(c) which relate to various types of cessation of work--a 'furlough,' a 'leave of absence' and a discharge. A furlough is not considered a discharge. It is a form of lay-off. So is a leave of absence. And whether either results from unilateral action by the employer or otherwise, consequences are quite different from termination of the employment relationship. Section 8(c) of the Act recognizes that insurance and other benefits may continue to accrue to an employee on furlough or on leave of absence. An employee on furlough or on leave of absence has a continuing relationship with the employer; he retains a right to be restored to work under specified conditions. (FN12) Thus when Congress desired to cover the contingency of a lay-off, it used apt words to describe it. If it had desired to enact that, so long as there was work, no restored veteran, regardless of seniority, could be temporarily laid off during the year following his restoration, when the slackening of work required a reduction in forces, we are bound to believe that it would have used a word of the kind which it had itself recognized as being descriptive of that situation.

[13][14] The 'position' to which the veteran is

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restored is the 'position' which he left plus cumulated seniority. Certainly he would not have been discharged from such position[328 U.S. 288] and unable to get it back, if at the time of his induction into the armed services he had been laid off by operation of a seniority system. Plainly he still had his 'position' when he was inducted. And in the same sense he retains it though a lay-off interrupts the continuity of work in the statutory period. Moreover, a verteran on his return is entitled to his old 'position' or its equivalent even though at the time of his application the plant is closed down, say for retooling, and no work is available, unless of course the private employer's 'circumstances have so changed as to make it impossible or unreasonable' to restore him. s 8(b)(B). He is entitled to be recalled to work in accordance with his seniority. His 'position' exists though no work is then available. The slackening of work which causes him to be laid off by *1113 operation of a seniority system is neither a removal or dismissal or discharge from the 'position' in any normal sense. Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. There is indeed no suggestion that Congress sought to sweep aside the seniority system. What it undertook to do was to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for a year.

The construction which we have given 'discharged' does not rob that guarantee of vitality. As the Circuit Court of Appeals observed, where there is a closed shop agreement the union would normally afford its members protection against termination of their employment status without cause. But in many situations the guarantee against dismissal without cause for one year is of great [328 U.S. 289] practical importance and is a protection granted veterans only.

Our construction of the Act finds support in its legislative history. Representative May had charge of the bill on the floor of the House. He explained an amendment to s 8(c), which added the words 'shall be considered during the period of service in such forces as on furlough or leave of absence' and also elaborated the clause dealing with 'insurance or other benefits.' He said:

'I may say that the chief purpose of the amendment is to preserve the seniority rights of the thousands and hundreds of thousands of railroad employees and other employees of that character who have certain seniority privileges on the railroads. In other words, we put them on furlough during the time they are in the service and they will even be permitted to count this time on the question of their retirement.' 86 Cong. Rec. 11702.

And before that amendment the committee Report of the Senate stated:

'The Congress, in this bill, has declared as its purpose and intent that every man who leaves his job to participate in this training and service should be reemployed without loss of seniority or other benefits upon his return to civil life.' S.Rep.No. 2002, 76th Cong., 3d Sess., p. 8.

We have searched the legislative history in vain for any statement of purpose that the protection accorded the veteran was the right to work when by operation of the seniority system there was none then available for him.

[15][16] It is said, however, that when Congress amended s 8 of the Act in 1944, (FN13) 58 Stat. 798, and extended the Act in 1945 without any change in s 8 (Pub. L. 54, 79th Cong., 1st Sess., 50 U.S.C.A.Appendix, s 316(b), it was apprised of an administrative interpretation of s 8(c) that [328 U.S. 290] a veteran was entitled to his former job regardless of seniority; and that therefore Congressional approval of or acquiescence in the administrative construction would be inferred. See Massachusetts Mutual Life Ins. Co. v. United States, 288 U.S. 269, 273, 53 S.Ct. 337, 339, 77 L.Ed. 739, and cases cited. An administrative interpretation was rendered by the Director of Selective Service who was authorized to administer the Act. (FN14) He had ruled that the Act required reinstatement of a veteran to 'his former position or one of like seniority, status, and pay even though such reinstatement necessitates the discharge of a non-veteran with a greater seniority .' (FN15) But a different construction was given to s 8(c) by the National War Labor Board in its handling of disputes arising out of the negotiation of collective bargaining agreements. (FN16) The Board read the Act as we read it. The ruling of the Director may be resorted to *1114 for guidance. See Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124; Mabee v. White Plains Pub. Co., 327 U.S. 178, 66 S.Ct. 511. But his rulings are not made in adversary proceedings and are not entitled to the

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weight which is accorded interpretations by administrative agencies entrusted with the responsibility of making inter partes decisions. Skidmore v. Swift & Co., supra, 323 U.S. page 139, 65 S.Ct. page 164, 89 L.Ed. 124. The history and language of the Act would need be far less clear for us to give his rulings persuasive weight. Moreover, as the Circuit Court of Appeals pointed out, the contrariety of administrative rulings (FN17) lends less credence to the contention that Congress by the amendment in 1944 and the extension in 1945 showed a preference for one over the other. In view of the language of the Act and the nature of the [328 U.S. 291] administrative findings we would want explicit indication by Congress that it chose the Director's interpretation before we concluded that Congress had adopted it.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice BLACK, dissenting.

I believe we should reverse the judgment of the Circuit Court of Appeals and remand the cause to it with directions to dismiss the appeal for want of jurisdiction because the Union was not a proper party to appeal. The money judgment was in favor of Fishgold and against the Sullivan Dry Dock and Repair Company. Had the Company paid the judgment I see no way in which the Union would have been 'aggrieved.' The only reason advanced by the Court for holding that the Union was 'aggrieved,' is that, had the District Court judgment remained on the books, the judicially formulated doctrine of res adjudicata would have barred the Union in any future proceedings from challenging the District Court's application of the federal statute to the particular collective bargaining agreement. A fair application of res judicata bars a party in a second litigation only if that proceeding involves the same issues as the first litigation between the same adverse parties or privies. This means that res judicata could bar the Union only in a new proceeding between it and Fishgold or his privies. But there is no possibility of such litigation since the seniority right which the District Court held Fishgold had under the statute had under its provisions expired by the time the Union appealed. Res judicata would not have barred the Union in a proceeding between it and any other party, since no other party was [328 U.S. 292] a party adverse to the Union in the present suit. And this includes any possible proceeding between the Union and the Sullivan Dry Dock Company since that Company, though a party, was not an adverse party in the trial court. None of the cases cited by the Court's opinion support the proposition that a party is bound in a future litigation against a party that was not an adverse party, but on the same side, in the earlier litigation. Nor do these cases or any other decision of this Court of which I am aware formulate as the rule of this Court the harsh doctrine of collateral estoppel, adopted in a few state jurisdictions, which always bars a losing party, so long as the issue is the same, even though the later litigation involves different adverse parties. It is unlikely that this harsh doctrine, never adopted by this Court, would in the future have been applied to bar the Union in any further proceedings involving interpretation of the scope of its collective bargaining agreement in the light of the federal statute. In my opinion the Union would not have been barred by the trial court's judgment. It was therefore not an aggrieved party and not entitled to appeal.

The result of permitting parties not adversely affected to appeal a judgment is to impose burdens upon litigants actually interested *1115. when those litigants may themselves be fully satisfied with the judgment. The scope of res judicata should not be extended to produce such a result. This case illustrates the wisdom of the practice which permits parties to settle their own lawsuits without intervention by others interested only in precedents. Boston Towboat Company v. United States, 321 U.S. 632, 64 S.Ct. 776, 88 L.Ed. 975.

FN1 The Act provides in part:

> 'Sec. 8(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *
>
> '(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within forty days after he is relieved from such training and service--

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'(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

'(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; * * *.'

The forty day period has been extended to ninety days. Section 8(b) as amended in 1944, 58 Stat. 798, gives the veteran a right to be reemployed if he makes application 'within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year.'

FN2 The agreement provided:

'Any employee other than a probationary employee who is drafted or volunteers for the Naval, Military or Merchant Marine Service of the United States, shall retain his seniority standing. In any further determination of said employee's seniority status, the length of time spent by the employee in such service shall count toward his seniority as if he were actually and continuously employed by the Company. Any such employee who volunteers or is drafted must give the Company notice of his intention to so leave his employment. Any such employee who, within forty (40) days after his release or discharge from said service applies for re-employment, shall be rehired by the Company, provided work is available and the employee is reasonably fit for duty. Availability for work will be determined according to accumulated seniority and ability. If re-employed, said employee shall then receive the then current rate of pay for the job for which he is re-employed.'

FN3 Section 8(e) provides:

'In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: Provided, That no fees or court costs shall be taxed against the person so applying for such benefits.'

The United States appeared as amicus curiae in the Circuit Court of Appeals. It appears in this Court as representative of petitioner by reason of the provisions of s 8(e).

FN4 Permissive intervention is governed by Rule 24(b) of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, which allows it on timely application 'when an applicant's claim or defense and the main action have a question of law or fact in common.'

FN5 Section 8(c) of the Act provides:

'Any person who is restored to a position in accordance with the rovisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to emloyees on furlough or leave of absence in effect with the employer at the time such person was ordered into such service, and shall not be discharged from such position without cause within one year after such restoration.'

Paragraphs (A) and (B) of subsection (b) of s 8 are set forth in note 1, supra.

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FN6 In that case Boston Tow Boat Co. intervened in a proceeding before the Interstate Commerce Commission involving the status of another carrier. It sought to appeal from the adverse decision against the other carrier. That right was denied. The order in question *1115. was not determinative of the status of Boston Tow Boat Co. That question was involved in another order of the Commission from which Boston Tow Boat Co. had an appeal pending.

FN7 The case is therefore closely analogous to one where the interest of an intervenor in property involved in the litigation was adjudicated. Dexter Horton Nat. Bank v. Hawkins, 9 Cir., 190 F. 924; United States v. Northwestern Development Co., 9 Cir., 203 F. 960.

FN8 Section 8(b) is set forth in note 1, supra, and s 8(c) in note 5, supra.

FN9 As we have noted, the original forty day period has been extended to ninety days. See note, 1, supra.

FN10 'Release or dismissal from an office, employment, etc., as, the discharge of a workman.' Webster's New International Dictionary (2d ed.)

'To relieve of a charge or office; (more usually) to dismiss from office, service, or employment; to cashier.' Oxford English Dictionary.

FN11 Temporary suspension of an employee's work commonly does not affect the continuance of his status. See National Labor Relations Board v. Waterman S.S. Co., 309 U.S. 206, 60 S.Ct. 493, 84 L.Ed. 704; North Whittier Heights Citrus Ass'n v. National Labor Relations Board, 9 Cir., 109 F.2d 76, 82.

'Lay-off' is defined as 'A period during which a workman is temporarily dismissed or allowed to leave his work; that part or season of the year during which activity in a particular business or game is partly or completely suspended; an off-season.' Oxford English Dictionary, Supp.

FN12 See Union Agreement Provisions, Bureau of Labor Statistics, Department of Labor, H.Doc.No.723, 77th Cong., 2d Sess., chs. 8, 14.

FN13 See note 1, supra.

FN14 Executive Order 8545, September 23, 1940, 5 Fed.Reg. 3779.

FN15 Local Board Memorandum 190-A, May 20, 1944, Part IV, s 1(C).

FN16 See Scoville Mfg. Co., 21 War Labor Rep. 200, 201, 202.

FN17 See Note 54 Yale L.Journ. 417.

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*197 147 L.R.R.M. (BNA) 2723, 65 Empl. Prac. Dec. P 43,395, 129 Lab.Cas. P 11,209

Jerry M. HILLMAN, Plaintiff-Appellant,
v.
ARKANSAS HIGHWAY & TRANSPORTATION DEPARTMENT, Defendant-Appellee.

No. 94-1676.
United States Court of Appeals, Eighth Circuit.
Submitted Sept. 15, 1994.
Decided Oct. 27, 1994.

Veteran sued state Department of Transportation under Veterans' Reemployment Rights Act. The United States District Court for the Eastern District of Arkansas, Jerry W. Cavaneau, United States Magistrate Judge, found just cause for termination. Veteran appealed. The Court of Appeals, Bogue, Senior District Judge, sitting by designation, held that: (1) issue preclusion did not apply, and (2) veteran was discharged for cause.

Affirmed.

1. JUDGMENT k634
228 ----
228XIV Conclusiveness of Adjudication
228XIV(A) Judgments Conclusive in General
228k634 Nature and requisites of former adjudication as ground of estoppel in general.

C.A.8 (Ark.) 1994.

Under Arkansas law, four elements of issue preclusion are: issue is same as that involved in prior litigation; issue was actually litigated; issue was determined by valid and final judgment; and determination was essential to judgment.

2. SOCIAL SECURITY AND PUBLIC WELFARE k619.5
356A ----
356AVIII Unemployment Compensation
356AVIII(G) Proceedings
356AVIII(G)5 Hearing
356Ak618 Determination and Order
356Ak619.5 Conclusiveness and effect; finality.

C.A.8 (Ark.) 1994.

"Misconduct" under Arkansas unemployment compensation law, and "just cause" under Veterans' Reemployment Rights Act were different legal standards, and thus issue preclusion did not apply to question of whether termination was for "cause" in action pursuant to Veterans' Reemployment Rights Act, based upon finding in earlier action that termination was not based upon "misconduct" for unemployment compensation purposes; greater element of subjective culpability was required for finding of "misconduct" than "just cause." A.C.A. Sec. 11-10-514(a); 38 U.S.C.A. Secs. 4301-4307.

3. FEDERAL COURTS k852
170B ----
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)5 Questions of Fact, Verdicts and Findings
170Bk852 What constitutes clear error, and effect thereof.

[See headnote text below]

3. FEDERAL COURTS k853
170B ----
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)5 Questions of Fact, Verdicts and Findings
170Bk852 What Constitutes Clear Error, and Effect Thereof
170Bk853 Definite and firm conviction of mistake.

C.A.8 (Ark.) 1994.

Under clearly erroneous standard, reversal is proper only if decision was unsupported by substantial evidence, based on erroneous interpretation of applicable law, or, in light of entire record, appellate court is left with firm and definite conviction that mistake has been made.

4. ARMED SERVICES k120
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k120 Discharge.

C.A.8 (Ark.) 1994.

Reasonableness of veteran's discharge from employment is determined by asking whether it was fair to discharge veteran because of his conduct and

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whether veteran had notice, express or fairly implied, that such conduct would be grounds for discharge. 38 U.S.C.A. Secs. 4301-4307.

5. ARMED SERVICES k120
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k120 Discharge.

C.A.8 (Ark.) 1994.

"Just cause" existed for discharge of veteran, from state transportation department, where he told co-workers that he "would" or "could" sabotage audits to embarrass his supervisor. 38 U.S.C.A. Secs. 4301-4307.

*198 Sammie Strange, Little Rock, AR, argued, for appellant.

Tom Lorenzo, Little Rock, AR, argued (Robert L. Wilson and Calvin Gibson, on the brief), for appellee.

Before McMILLIAN, and MAGILL, Circuit Judges, and BOGUE, (FN*) Senior District Judge.

BOGUE, Senior District Judge.

Jerry Hillman (appellant) appeals the district court's (FN1) decision in favor of his former employer, Arkansas Highway and Transportation Department (Department), in a suit brought under the Veterans' Reemployment Rights Act (Act), 38 U.S.C. Sec. 4301-07. For the reasons stated herein, we affirm.

BACKGROUND

From May 1973 to January 1981 appellant was employed by the Department as an auditor. Appellant then served two years in the Navy and following his discharge was rehired by the appellee. Following his reinstatement, a dispute arose regarding appellant's compensation and seniority status. The Act requires, inter alia, that rehired-veterans be restored to their prior positions without loss of seniority, benefits or compensation. 38 U.S.C. Sec. 4301(a-b). Appellant's supervisor William McDorman (McDorman) believed appellant to have personality and attitude problems and attempted to justify appellant's rate of pay on those grounds. The dispute was *199 ultimately resolved in the appellant's favor in a Department of Labor proceeding.

Evidence exists that during the foregoing dispute, appellant made comments to two co-workers to the effect that he would or could sabotage audit reports and work papers in an effort to embarrass McDorman. When McDorman became aware of the alleged statements an informal hearing was conducted by McDorman's supervisor, Gip Robertson. Appellant was terminated "specifically and strictly" on the basis of his statements regarding sabotage of audits.

Following his termination, appellant applied for unemployment compensation benefits with the Arkansas Employment Security Division (AESD). Benefits are not available to employees terminated for "misconduct" and the Department, citing the threats of sabotage, objected to appellant's application on those grounds. The AESD made a determination that the evidence was not sufficient to establish misconduct and awarded appellant benefits. The Department did not appeal that decision.

Appellant instituted the present action alleging his rights secured by the Act were violated. Specifically, appellant claimed his termination violated 38 U.S.C. Sec. 4301(b)(1)(A), which provides that a veteran shall not be discharged without cause within one year after reemployment. The district court found just cause for the termination to exist, therefore concluding appellant's termination was not prohibited by the Act. Appeal was taken on two grounds.

Appellant first asserts the district court erred as a matter of law in failing to apply the doctrine of issue preclusion to the question of whether the department's termination was for cause. After presenting his evidence to the district court, appellant moved for directed verdict based on the doctrine of "res judicata " (FN2). The motion, denied by the district court, was based on the previous decision by the AESD that the appellant was not terminated for misconduct. This court is presented with the question of whether the AESD's decision regarding "misconduct" should have had preclusive effect on the district court on the issue of "for cause" termination under the Act.

DISCUSSION

[1] Under Arkansas law, the four elements of issue preclusion are:

(1) the issue is the same as that involved in a prior litigation;

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(2) the issue was actually litigated;

(3) the issue was determined by a valid and final judgment; and

(4) the determination was essential to the judgment.

National Farmers Union Standard Ins. v. Morgan, 966 F.2d 1250, 1253 (8th Cir.1992) (citing East Texas Motor Freight Lines v. Freeman, 289 Ark. 539, 713 S.W.2d 456, 459 (1986)). Of the four elements, the parties' primary source of contention is the first, i.e., did the AESD's determination regarding "misconduct" under Arkansas state law and the district court's determination of "just cause" under the Veterans' Reemployment Act constitute the "same issue."

[2] We are satisfied that because the definitions and legal standards involved in the respective determinations were distinct, the issues were not the same. The district court, citing numerous circuit court decisions, explained what was required to find "cause" under the Act. The court stated:

> The only cause which would warrant discharge would be lack of skill, competence, diligence or loyalty in performance of duties. Discharge can be based upon the veteran's lack of loyalty and cooperation. A veteran must comply with reasonable and ordinarily accepted standards of personal and professional conduct.

Memorandum Opinion and Order at 5 (citations omitted).

This standard is contrasted by decisions construing "misconduct" under the Arkansas *200. Employment Security Law, A.C.A. Sec. 11-10-514(a). While various definitions of the term have been given by Arkansas courts, it appears generally accepted that a finding of misconduct will attach only to conduct evincing "an intentional or deliberate violation [of employer rules], a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design ..." A. Tenebaum Co. v. Director of Labor, 32 Ark.App. 43, 796 S.W.2d 348 (1990), see also, Shipley Baking Co. v. Stiles, 17 Ark.App. 72, 703 S.W.2d 465 (1986). While there may be some overlap in the definitions of the respective terms, a greater element of subjective culpability appears to be required for a finding of "misconduct" than that needed to find "just cause" under the Act. We are inclined to agree with the district court that while misconduct would always constitute just cause, the converse is not necessarily true.

The appellant alleges that because the factual determinations needed for findings are the same, the collateral estoppel should have been applied. The appellant's argument misses the mark. While the facts presented in both circumstances may indeed have been the same, the legal standards governing the decisions are different. The more exacting standard applied by the AESD prevents the issues from being the same. Because the issues presented in the respective proceedings were different, the district court did not err in refusing to apply the doctrine of issue preclusion. (FN3)

[3] The appellant next charges the trial court's ultimate finding that the Department had just cause to discharge the appellant was clearly erroneous. A district court's findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses. Fed.R.Civ.P. 52(a). Under the clearly erroneous standard, reversal is proper only if the decision was "unsupported by substantial evidence, based on an erroneous interpretation of applicable law, or, in light of the entire record, we are left with a firm and definite conviction that a mistake has been made." United States v. Meirovitz, 918 F.2d 1376, 1379 (8th Cir.1990), cert. denied, --- U.S. ----, 112 S.Ct. 101, 116 L.Ed.2d 71 (1991) (citations omitted).

[4][5] Based on the record before us, we do not believe the district court's finding of for cause discharge was clearly erroneous. Reasonableness of the discharge is determined by asking whether it was fair to discharge the veteran because of his conduct and whether the veteran had notice, express or fairly implied, that such conduct would be grounds for discharge. Carter v. United States, 407 F.2d 1238, 1244-45 (D.C.Cir.1968). Based on his observation of witnesses and evidence, the trial court answered both questions in the affirmative. Our review of the record reveals no error in these determinations.

Appellant asserts that his termination based on the threats of sabotage was pretextual, that the true reason he was fired was his initial wage claim filed against the Department. This theory was presented to the trial court which determined, based on the evidence, that no pretext was involved and that the Department

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had just cause to discharge the appellant. The appellant occupied an important position in state government and one demanding trustworthiness. Whether appellant told co-workers he "would" or "could" sabotage audits, or whether or not he was serious, it appears the Department was justified in its concern. Having found the threats to have indeed been made, the trial court did not err in finding the discharge was for cause.

FN* The HONORABLE ANDREW W. BOGUE, Senior United States District Judge for the Western Division of the District of South Dakota, sitting by designation.

FN1. Honorable Jerry W. Cavaneau, United States Magistrate Judge, United States District Court for the Eastern District of Arkansas.

FN2. There exists some confusion regarding the terminology used to describe former adjudications. It is now generally accepted that the broad "res judicata" phrase encompasses both "claim preclusion" and "issue preclusion" (collateral estoppel). The present action presents circumstances involving issue preclusion and we will utilize that term as the currently-preferred phraseology. 18 Wright, Miller & Cooper, Federal Practice and Procedure, Sec. 4401-02.

FN3. The Department cites other reasons for upholding the district court's decision not to apply issue preclusion. Chief among them is the fact that the AESD does not employ the Federal Rules of Evidence, Federal Rules of Civil Procedure nor the common law in its proceedings. Additionally, the appellant did not plead the AESD's prior determination pursuant to Fed.R.Civ.P. 8(c) or 9(e). Because the Court finds the elements of issue preclusion not to be met, it is unnecessary to comment on these arguments.

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*1020 334 U.S. 323, 92 L.Ed. 1416

HILTON
v.
SULLIVAN et al.

No. 560.
Argued April 21, 1948.
Decided June 1, 1948.

Action by Earle W. Hilton against John L. Sullivan, Secretary of the Navy, Frances Perkins, Harry B. Mitchell and Arthur Flemming, members of the Civil Service Commission, for declaratory judgment as to the rights of plaintiff and for mandamus and other relief. A summary judgment for the defendants was affirmed by the Court of Appeals for the District of Columbia, 165 F.2d 251, and the plaintiff brings certiorari.

Judgment affirmed.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

1. CONSTITUTIONAL LAW k42.3(3)
92 ----
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k41 Persons Entitled to Raise Constitutional Questions
92k42.3 Particular Classes of Persons
92k42.3(3) Government or public officers or employees.

Formerly 92k42

U.S. 1948.

Where Civil Service Commission regulation gave priority, first, to all veterans of World War II, regardless of length of service or efficiency ratings for one year after return to duty and, second, to veteran preference employees with 'good' or higher efficiency ratings, invalidity of first classification would not put members thereof into second classification unless their efficiency ratings were at least 'good', and in view of such fact and the fact that first category was an open and continuing one, a permanent status non-veteran civil service employee in Charleston Navy Yard was entitled to challenge the validity of the first classification though a large number of present employees in such category had ratings of 'good' or higher. Selective Training and Service Act of 1940, s 8, as amended, 50 U.S.C.A.Appendix, s 308.

2. ARMED SERVICES k115(2)
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k115 Veterans Entitled
34k115(2) Governmental officers and employees.

[See headnote text below]

2. STATUTES k190
361 ----
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 Existence of ambiguity.

U.S. 1948.

The language of the Selective Service Act that federal employees on completion of service in armed forces shall be restored to former positions or to positions of like seniority, status and pay and that they shall not be discharged without cause within one year thereafter is unambiguous and mandatory. Selective Training and Service Act of 1940, Sec. 8(b) (A, B), (c), as amended, 50 U.S.C.A.Appendix, Sec. 308(b) (A, B), (c).

3. ARMED SERVICES k118(2)
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k118 Position Restorable
34k118(2) Particular positions.

Formerly 34k51

U.S. 1948.

Under statute requiring restoration to former or like positions of federal employees on completion of service in armed forces and prohibiting their discharge without cause within one year thereafter, civil service regulation giving priority to all veterans of World War II regardless of length of service or efficiency ratings for one year after such restoration is valid. Selective Training and Service Act of 1940, Sec. 8(b) (A, B), (c), as amended, 50 U.S.C.A.Appendix, Sec. 308(b) (A, B), (c).

4. ARMED SERVICES k120

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34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k120 Discharge.

U.S. 1948.

Construction of statutory provision against discharge of veteran must be made in light of whether he returns to a government-guaranteed or a private nonguaranteed job, and prohibition against discharge by a private employer cannot be accepted as determinative of the scope of congressional prohibition against discharge by the government. Selective Training and Service Act of 1940, Sec. 8, as amended, 50 U.S.C.A.Appendix, Sec. 308.

5. ARMED SERVICES k118(2)
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k118 Position Restorable
34k118(2) Particular positions.

Formerly 34k51

U.S. 1948.

A compulsory furlough of veteran employee within one year after return to government job would be a "discharge" within statute prohibiting discharge without cause within such time, and Civil Service Commission's regulation giving priority to veterans of World War II regardless of length of service or efficiency ratings for one year after return to duty, is valid. Selective Training and Service Act of 1940, Sec. 8(b) (A, B), (c), as amended, 50 U.S.C.A.Appendix, Sec. 308(b) (A, B), (c).

See publication Words and Phrases for other judicial constructions and definitions.

6. OFFICERS AND PUBLIC EMPLOYEES k68
283 ----
283I Appointment, Qualification, and Tenure
283I(G) Resignation, Suspension, or Removal
283k68 Preference of discharged soldiers, sailors, or marines in making removals.

U.S. 1948.

Under statute providing that Civil Service Commission regulations shall give due effect to tenure, military preference, length of service and efficiency ratings of civilian employees of federal agencies, provided that time in active service in armed forces shall be included in computing length of total service and provided further that preference employees with efficiency ratings of "good" or higher shall be retained in preference to all other competing employees and that preference employees rated below "good" shall be retained in preference to competing non-preference employees with equal or lower ratings, veterans' preference employees with required ratings must be retained in preference to all other competing employees without regard to length of service as between veterans and non-veterans, and Civil Service Commission rule to such effect is valid. Veterans' Preference Act of 1944, Sec. 2, as amended and Sec. 12, 5 U.S.C.A. Secs. 851 and 861.

7. CONSTITUTIONAL LAW k70.3(14)
92 ----
92III Distribution of Governmental Powers and Functions
92III(B) Judicial Powers and Functions
92k70 Encroachment on Legislature
92k70.3 Inquiry Into Motive, Policy, Wisdom, or Justice of Legislation
92k70.3(9) Particular Subjects of Legislation, Application to
92k70.3(14) Government.

Formerly 92k70(3)

U.S. 1948.

Where Congress passed bill with full knowledge that long-standing absolute retention preferences of veterans would be embodied in the act, the responsibility of the Supreme Court is to interpret the act, not to overrule the congressional policy. Veterans' Preference Act of 1944, s 2, as amended and s 12, 15 U.S.C.A. ss 851 and 861.

*1021 [334 U.S. 324] Mr. Charles Fahy, of Washington, D.C., for petitioner.

[334 U.S. 325] Mr. Paul A. Sweeney, of Washington, D.C., for respondent.

Mr. Justice BLACK delivered the opinion of the Court.

This case raises questions concerning the relative rights of war veteran and nonveteran employees to retention in government service when a program of

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reduction in the number of government civilian employees makes it necessary for some to be chosen for discharge. The acute point of controversy is this: In the treatment of permanent tenure civil service employees, should qualified honorably discharged war veterans, merely because they are such, be retained in preference to nonveterans, even though those nonveterans have served the Government a substantially longer time than the veterans. The questions depend upon whether certain regulations promulgated by the Civil Service Commission are valid under a proper interpretation of controlling statutes.

The petitioner was for twelve years, from 1934 to 1946, a duly appointed permanent status civil service employee working in the Charleston Navy Yard. His work was of such high quality as to earn him an efficiency rating of 'Excellent.' By successive promotions, he arrived at the responsible position of Leadingman Shipfitter at a basic wage of $12.08 per day. January 7, 1946, shortly after the post-hostility reduction of governmental employees began, petitioner was demoted to a position paying $10.08 per day as part of a reduction in force. This demotion apparently was due in part to the fact that he did not have a veteran's preference. October 7, 1946, [334 U.S. 326] petitioner was notified that due to curtailment of work and funds it was necessary to eliminate certain positions in his competitive level and that in accordance with civil service regulations his name had been reached for action. He was told that, if he approved, he was then to be placed in a one-year 'furlough status' rather than absolutely separated from service because it was hoped that conditions might justify his recall to duty within the year. He was also informed that his 'active service' had already been terminated and that unless sooner recalled to duty he would be separated for reduction in force at the end of his one-year furlough period.

The civil service regulations said to require termination of petitioner's active service divide government employees into three main groups--A, B, and C. Group A, which has the highest priority for retention, is composed of 'permanent employees'; groups B and C are composed of employees with limited tenures of employment. Group A is divided into five subgroups, the first three of which are of particular importance here. These three subgroups are:

Subgroup A-1 Plus, (Veterans of World War II) for a one-year period after return to duty;

*1022 Subgroup A-1, Veteran's preference employees with 'good' (or higher) efficiency ratings;

Subgroup A-2, Employees without veteran's preference with 'good' (or higher) efficiency ratings. (FN1)

The result of these Commission groupings is that A-1 Plus veterans have the highest retention priority; A-1 the second; and A-2, in which, not having a veteran's preference, petitioner is classified, has the third. Thus [334 U.S. 327] if these regulations are valid, every member of both Subgroup A-1 Plus and Subgroup A-1 must be retained in preference to petitioner.

After receiving notice of his one-year furlough, petitioner filed this complaint in district court for declaratory judgment, mandamus, and other relief. The defendants were the Secretary of the Navy and the members of the Civil Service Commission. The complaint charged that petitioner's demotion and furlough were the result of the Commission's regulations which prescribed retention priorities for veterans' preference employees in A-1 Plus and A-1 over all nonveteran employees without regard to the longer periods of service of some of the nonveteran employees, including petitioner. The failure of the Commission to consider relative length of service in establishing these retention priorities was charged to be 'unreasonable, arbitrary, and capricious, without statutory warrant, and contrary to the express provisions' of applicable statutes. The petitioner's prayer was that the Commission's A-1 Plus and A-1 classifications be declared void, that the Secretary of the Navy be compelled to restore him to his original position as Leadingman Shipfitter, that the Commission be required to rescind the regulations and promulgate new ones in accordance with law, and that 'such other and further relief as is just' be granted him. After answer and certain stipulations of fact, both parties moved for summary judgment and the government's motion was granted. The Court of Appeals for the District of Columbia affirmed. 165 F.2d 251. Importance of the questions raised prompted us to grant certiorari. 333 U.S. 841, 68 S.Ct. 663.

[1] First. While admitting petitioner's right to challenge the validity of Subgroup A-1 in this action, the Government contends that he cannot challenge A-1 Plus. The premise of this argument is that, even if A-1 Plus were invalid, the veterans grouped in it

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would fall within [334 U.S. 328] Subgroup A-1. We find no adequate support for this premise in the record. Veterans in Subgroup A-1 Plus could not qualify for A-1 unless they had efficiency ratings of 'good' or better. But the language defining A-1 Plus includes veterans of all ratings, even below 'good.' And when the summary judgment in this case was rendered, 61 of the 118 veterans comprising A-1 Plus had not been rated at all. True, the Government asserts that 60 of these veterans have now been rated 'good' and the sixty-first member has resigned. But the potential membership of Subgroup A-1 Plus is not limited to those veterans who were in it when the case was tried. The classification provides for a continuing status of preference of one year for all returning veterans who left government employment for war duty. There is no indication that additional war veterans qualified for classification under A-1 Plus will not return to Charleston Navy Yard and reclaim shipfitter jobs in preference to otherwise qualified nonveteran employees. And the Government does not claim that this classification has been repealed or altered so that in the future it can include only those veterans who have an efficiency rating of 'good' or higher. Under these circumstances we are unable to say that all members of A-1 Plus could qualify or will be able to qualify as members of A-1. Therefore we cannot accept the government's contention that petitioner's *1023 likelihood of injury from A-1 Plus is too remote to justify his attack on it. If invalid, there is as much reason for his right to challenge this subgroup as for his right to challenge Subgroup A-1.

Second. The Government finds support for Subgroup A-1 Plus in s 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 890, 50 U.S.C.Appendix, s 308, 50 U.S.C.A.Appendix, s 308. That section provides reemployment rights to any person who under that Act left a position other than a temporary one in order to perform training and service in the armed [334 U.S. 329] forces and who satisfactorily completed his training. It further requires that upon appropriate application after release from training, such person, if still qualified to perform the duties of his old job and 'if such position was in the employ of the United States Government, * * * shall be restored to such position or to a position of like seniority, status, and pay.' Section 8(c) also provides that a person so restored to his old position 'shall not be discharged from such position without cause within one year after such restoration.'

[2] There appears to be little room for contention that there is ambiguity in the language that Congress selected to express its purpose to require the restoration of a former government employee who entered the armed forces to his old position and to give him the right to retention for a year. The language is that such an employee 'shall be restored' to his position or to one like it, supplemented by language that he 'shall not be discharged from such position without cause within one year after such restoration.' We have examined the legislative history of the Selective Training and Service Act of 1940 and find nothing whatever which faintly suggests that Congress intended its language to be less mandatory than implied by the words it used. The command in s 8(b)(A) that the Federal Government rehire its returning veteran employees contrasted sharply with the requirement in s 8(b)(B) that a private employer need not reemploy such a veteran when 'the employer's circumstances have so changed as to make it impossible or unreasonable to do so.' This difference was noted by the congressional sponsors of the 1940 Act, who thought that the Federal Government should set an example to private industry by providing jobs for all returning veteran employees. (FN2) [334 U.S. 330] Congress, having, thus provided that the veteran who left a government job must be reemployed, also required his retention by declaring that he should not be discharged within a year without cause.

Petitioner contends, however, that this Court's interpretations of s 8(b)(B) and s 8(c) in Trailmobile Co. v. Whirls, 331 U.S. 40, 67 S.Ct. 982, 91 L.Ed. 1328, and in Fishgold v. Sullivan Drydock & Repair Co., 328 U.S. 275, 66 S.Ct. 1105, 90 L.Ed. 1230, 167 A.L.R. 110, require a holding that the regulations establishing A-1 Plus are invalid. The Trailmobile case dealt only with the obligations of a private employer to veterans after the first year of their return to his employment, and our holding there is of no relevance here. In the other case, Fishgold, following his discharge from the armed forces, had been restored to his old position by his former private employer. Within one year thereafter temporary layoffs became necessary on each of nine days. Fishgold was laid off while nonveterans with longer service were continuously kept at work in accordance with a collective bargaining agreement which required that 'decreases' in the working force be based primarily upon 'length of service.' This Court held that since Fishgold's layoffs were temporary, he still retained an employment relationship, and thus had not been 'discharged' within the meaning of s 8(c). The statute was held not to require that when slack work compelled a private employer to lay off some workers

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temporarily a veteran restored to his job be given continuous work for one year after his reinstatement *1024 in preference to other nonveteran employees who under the terms of company employer-employee contract were entitled to such work by reason of their greater 'length of service.'

[3] There are several reasons why we cannot accept petitioner's argument that the Fishgold case requires the invalidation of the A-1 Plus classification. In the first place, we are here concerned with the one-year retention [334 U.S. 331] rights of veterans restored under s 8(b)(A) to their old jobs with the Federal Government, not, as in the Fishgold case, with the rights of veterans restored to jobs in private industry under s 8(b)(B). We have previously pointed out that Congress in s 8(b)(A) imposed a mandatory and unconditional reemployment obligation upon the Federal Government; in other words the section guaranteed that a returning veteran would get back his job with the Government. But s 8(b)(B) imposed no such unconditional guarantee that a returning veteran would be reemployed by his former private employer. For that subsection does not require restoration of returning veterans to their former private jobs if 'the employer's circumstances have so changed as to make it impossible or unreasonable' to rehire him.

[4] Thus Congress, evidently considering that there were significant differences in industrial and governmental employment practices and potentialities, imposed obligations to rehire returning veterans of a markedly different nature upon government and private employers. It did not define the 'impossible or unreasonable' circumstances that might relieve a private employer of the duty to rehire veterans, nor need we attempt to do so now. But it is plain that such circumstances might conceivably be such as seriously to affect, not only the reasonableness and possibility of rehiring, but also the reasonableness and possibility of retaining him for a full year's continuous work. For this reason, among others, interpretation of s 8(c)'s prohibition against discharge of a returning veteran must be made in light of whether he returns to a government-guaranteed or to a private non-guaranteed job. Therefore s 8(c)'s prohibition against 'discharge' by a private employer cannot be accepted as determinative of the scope of the congressional prohibition against 'discharge' by the Government.

[334 U.S. 332] The foregoing distinction is illustrated by the fact that civil service workers, unlike the private employees in the Fishgold case, are not confronted by a situation in which their employer, the Government, has an outstanding contract with them providing that they shall be retained in service in proportion to their 'length of service' as reductions in force become necessary. Whatever seniority rights government employees have when discharges or reductions in force are made depend entirely upon congressional acts and regulations issued in harmony with them. See 37 Stat. 555, 5 U.S.C. s 652, 5 U.S.C.A. s 652. We have discovered no acts or regulations which can be construed to recognize a nonveteran's length of government service as a factor sufficient to override the requirement of s 8(b)(A) and s 8(c) that a veteran must be restored to his old job with the Federal Government and cannot be discharged therefrom without cause for one year. Thus, unlike the employees in the Fishgold case whose private-employment contract-derived seniority prevented their being laid off, petitioner has no comparable statutorily derived seniority rights to his job with the Government. Petitioner argues, however, that s 12 of the Veterans' Preference Act of 1944, 58 Stat. 390, 5 U.S.C. s 861, 5 U.S.C.A. s 861, in effect amended s 8 and conferred retention rights upon him based upon his length of service. For the reasons we give below in discussing the validity of Subgroup A-1, we think this contention is without merit.

[5] Finally, the Fishgold decision held only that a temporary layoff did not violate a veteran's right under s 8(c) not to be discharged without cause for one year after he had been restored to his old job. Here the petitioner asserts that the statutory one-year prohibition against discharge confers upon a reemployed veteran no security *1025 from a furlough for one year without pay, that such a furlough is not a 'discharge' within the meaning of [334 U.S. 333] s 8(c). The Commission has here treated a furlough of more than thirty days as the equivalent of a discharge. This is in accordance with prior governmental practice which has considered that the furlough of a veteran with military preference violates regulations providing that he shall not be 'discharged or dropped' when 'reductions in force are being made.' (FN3) Moreover, s 14 of the Veterans' Preference Act, 5 U.S.C.A. s 863, which safeguards preference eligibles against administrative denial of their preference rights, specifically places furloughs and suspensions for more than thirty days without pay on the same basis as discharges. Thus, the common meaning of furlough in governmental practice is not the same as that which the Court in the Fishgold case found to be the meaning of 'layoffs' and 'furloughs' in 'industrial parlance.' To give this one-year 'furlough'

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any less meaning than the statutory word 'discharge' would result in depriving government employee veterans of the entire congressional guarantee of a year's retention in their old jobs. We hold that the furlough, if applied to veterans, would be a 'discharge' within the meaning of s 8(c). Consequently, the Commission acted within its statutory duty by providing veterans a preference against such removals by establishing Subgroup A-1 Plus.

Third. Petitioner strongly urges invalidity of Subgroup A-1, which gives all permanent employee 'Veterans with 'good' or higher efficiency ratings' retention preferences over all nonveterans, even over nonveterans with higher efficiency ratings and longer government service. While conceding that under some limited circumstances veterans with 'good or higher ratings' are granted preference by s 12 of the Veterans' Preference Act of 1944, petitioner [334 U.S. 334] argues that the section does not require but actually prohibits any preference for veterans over nonveterans which fails to give substantial weight to a nonveteran's longer government service. The Government urges that the section requires an absolute retention preference for veterans who have the required efficiency ratings without regard to the fact that nonveterans may have had longer government service. An alternative argument is that, whether absolutely required or not, the Commission's subgrouping is well within the power to promulgate 'rules and regulations' specifically authorized by s 12. The question presented is therefore one of interpretation of the relevant language of s 12.

The part of the section on which petitioner particularly relies reads: 'In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: Provided, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service * * *.' Petitioner interprets this portion of s 12 as a congressional command that the Commission must invariably give 'due effect' to length of service in determining what employees, whether veterans or nonveterans, shall first be discharged in a reduction-of-force program. In effect he argues that the above language provides no other 'military preference' in civil service for a veteran employee over a nonveteran with greater 'length of service' than that defined in the above proviso, namely, that the length of a veteran's army service shall be credited in computing the length of his total government service.

[334 U.S. 335] The part of s 12 on which the Government supports the Commission's recognition of a veteran's absolute retention preference without regard to comparative length of service of veterans and nonveterans *1026 follows immediately after that section's language on which petitioner relies, and reads:

'* * * Provided further, That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings * * *.'

[6] The Government interprets this proviso as a special withdrawal of the proviso-defined classes of veterans from the general terms of the first clause of s 12 relating to 'length of service.' It views this proviso as the congressional creation of classes of veterans' 'preference employees' (FN4) who 'shall', if they have the defined efficiency ratings, 'be retained in preference to all other competing employees' without regard to length of service as between veterans and nonveterans. Thus, under the government's interpretation, length of service would be given the 'due effect' required by the first clause of s 12 by its consideration in the determination of retention preferences as between veteran and veteran and as between nonveteran and nonveteran. This interpretation of the proviso and the section, it is argued, would give meaning to all the language used in them, is plainly called for by the language, and harmonizes this portion of the Act with all its other parts and with the Act's broad purposes. The interpretation is compelled, so the [334 U.S. 336] Government argues, by the Act's legislative history, particularly when the proviso and preceding clauses in the section are viewed in the light of a long series of prior congressional enactments and authorized executive orders granting preferences in government employment to veterans and their close relatives. We agree with the Government that in the light of the foregoing factors no other interpretation of the pertinent parts of the section can fairly be reached.

In 1876, seventy-two years ago, Congress passed

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a law which required any executive department when making 'any reduction of force' to 'retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States and the widows and orphans of deceased soldiers and sailors.' 19 Stat. 143, 169, 5 U.S.C. s 37, 5 U.S.C.A. s 37. (FN5) In 1912 Congress greatly strengthened the old 1876 policy by providing that 'in the event of reductions being made in the force in any of the executive departments, no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped, or reduced in rank or salary.' 37 Stat. 360, 413, 5 U.S.C.A. s 648. (FN6) There is nothing ambiguous about this 1912 provision. It was an absolute command that no governmental department should discharge, drop, or reduce in rank any honorably discharged veteran government employee with a rating of 'good.' Length of service in no way qualified the [334 U.S. 337] preference given the veteran. And subsequent executive orders not only recognized this provision as giving veterans an absolute preference, (FN7) but also extended the preference to veterans *1027 in the field service (FN8) and to positions not under civil service. (FN9)

Executive Order 4240 of June 4, 1925, as amended by Executive Order 5068 of March 2, 1929, provided, as does Subgroup A-1 here, an absolute retention preference for veterans over nonveterans where the veterans' efficiency ratings were 'good,' and a similar absolute preference over nonveterans whose ratings were less than good if the veterans' ratings were equal to those of the nonveterans. And at the time of passage of the Veterans' Preference Act of 1944, there were 1943 Civil Service Regulations outstanding (FN10) which granted veterans with permanent tenure and with a rating of 'good' or higher, precisely the same absolute retention preference over nonveterans which is now afforded by Subgroup A-1, here attacked as invalid. Consequently, a holding that veterans with a rating of 'good' no longer have a retention preference over nonveterans with longer service, would mean that passage of the Veterans' Preference Act in 1944 narrowed the long-existing scope of veterans' preferences in case of reduction in force of government personnel. The purpose of that Act's sponsors and of Congress in passing it appears to have been precisely the opposite--to broaden rather than narrow the preference.

[334 U.S. 338] The Senate Civil Service Committee was told by the congressional sponsor of the measure that 'this bill takes away no existing veterans' preference, either by statute or Executive order, but it does strengthen, broaden and implement the veterans' preference policy heretofore in effect,' and that it would 'give legislative sanction to existing veterans' preference, to the rules and regulations in the executive branch of the Government. * * *.' (FN11) A member of the Civil Service Commission in explaining the bill to the Senate Committee called the proviso here involved the 'heart of the section,' (FN12) and stated that it 'was substantially the same' as the 1912 Act, (FN13) which as before pointed out, provided for an absolute veterans' retention preference without regard to length of service. (FN14) And in explaining the Bill on the floor of the House, the sponsor and active proponents of the measure explained [334 U.S. 339] it as strengthening and broadening veterans' preferences then embodied in statutes and executive orders. (FN15)

Not only did the friends of the Veterans' Preference Act explain to the Senate Committee on Civil Service and to the *1028 Congress the broad preferences the Act would grant. Hostile witnesses graphically pointed out to the Senate Committee what they deemed would be the unfairness of the Act's effect if passed as written. One such witness representing the Civil Service Reform League said: 'I think you ought to give consideration to * * * retention of veterans in civil service regardless of length of service. I do not think it is fair, a veteran be retained in service who has been in the service 6 months as against a person who has been in the service 25 years. I believe some distinction might be made, otherwise you would do a grave injustice to those people who have long years of service in civil service.' (FN16) And another witness against the Bill pointed out that under it nonveterans would 'be the first to be laid off and the last to be taken on.' (FN17)

[7] Thus Congress passed the bill with full knowledge that the long standing absolute retention preferences of veterans would be embodied in the Act. Petitioner makes an appealing argument against this policy. But it is a policy adopted by Congress, and our responsibility is to interpret the Act, not to overrule the congressional policy. (FN18)

Affirmed.

Mr. Justice REED, concurring.

I agree with the conclusion reached by the Court

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in this case. My disagreement with the opinion is limited [334 U.S. 340] to that portion of subdivision Second which indicates that the rights of a veteran as to discharge after restoration to employment by the United States differ from the corresponding rights of a veteran restored to employment by a private employer.

The rights to retention of employment of both veterans are governed by the same subsection 8(c). 54 Stat. 890. Section 8(c) specifies the same conditions for retention of employment for all employees whether they are reemployed by the United States or by private employers.

Nothing has come to my attention that indicates to me a congressional purpose to grant to one more rights as to continuity of employment than to the other. The legislation as to both depended upon the same constitutional authority--the War Power. I can see no reason to attribute to Congress an intention to guarantee public employment to a returning veteran regardless of the needs of the public service or to discriminate between equally deserving veterans. Compare Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 66 S.Ct. 1105, 90 L.Ed. 1230, 167 A.L.R. 110.

Mr. Justice FRANKFURTER and Mr. Justice JACKSON join in this opinion.

Mr. Justice RUTLEDGE, concurring.

I concur in the result. But I do so without expressing opinion concerning the validity of Subgroup A-1 Plus of the Regulations. That classification, as I understand it and the Court's construction of it, gives preference for retention for one year in governmental work to veterans[334 U.S. 341] of World War II over all others, including veterans of World War I, regardless of efficiency and length of service whether of the restored veteran or of his competitors. It may be that upon the sum of the legislation Congress intended to give so broad a priority to returning members of the military services. But if so, it is the one instance in which both efficiency and length of service *1029. have been absolutely disregarded. And it is at least possible, I think, to read the complex series of statutes bearing on the problem as not having been intended to go so far.

But I do not reach that question, because Subgroup A-1 does take account of efficiency. It gives preference to veterans unless their efficiency rating is less than 'good.' No specific mention of length of service is made. But while a classification which ignores all considerations both of efficiency and of length of service might be found unauthorized under the statutory scheme, (FN1) one which takes due account of efficiency, which is not wholly unrelated to length of service, well might be sustained. And in that event the Commission's judgment that veterans with efficiency ratings of 'good' or better should be preferred to all others could hardly be called arbitrary or in excess of the authority conferred. (FN2)

[334 U.S. 342] It is true that when petitioner was separated from service there were some 61 veterans classified A-1 Plus, without efficiency ratings and in priority to himself. (FN3) But we are informed, and it is not disputed, (FN4) that 60 of these men now have received efficiency ratings of 'good,' and therefore fall into Group A-1 in any event. The other of the 61 has resigned. Hence we are told, and this also is not disputed, that any order of the District Court purporting to require petitioner's restoration would mean that he is entitled to displace one of those veterans.

Since in my view Regulation A-1 is valid, regardless of whether A-1 Plus should stand, and since on the facts now before us Regulation A-1 is sufficient to exclude petitioner from restoration at this time, I do not think he has made a sufficient showing to call forth the exercise of our discretionary power in this proceeding to require the Commission to reformulate the Regulations. Upon the showing made the case is not one appropriate, in my judgment, for application of the discretionary remedy of a declaratory judgment.

FN1 The remaining two subgroups of A, not involved here, are:

Subgroup A--3, Veterans with efficiency ratings lower than 'good.'

Subgroup A--4, Nonveterans with efficiency ratings lower than 'good.' 5 Code Fed.Reg. (Supp.1945) s 12.303, now found in 5 Code Fed.Reg. (Supp.1947) s 20.3(a).

FN2 Hearings before House Committee on Military Affairs on H.R. 10132, 76th Cong., 3d Sess. 80--82, 118, 235; 86 Cong.Rec. 11697.

FN3 See 40 Ops. Att'y Gen. 115 (Sept. 20, 1946) 7, referring to Opinion, Attorney General Mitchell in

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1929, interpreting Executive Order 5068, March 2, 1929. The substance of that Order is set out in this opinion at 68 S.Ct. 1027.

FN4 The Act not only provides preferences for veterans but under certain circumstances grants preferences to veterans' wives, widows and mothers. s 2, 5 U.S.C. s 851, as amended by Pub.L. No. 396, 80th Cong., 2d Sess., Jan. 19, 1948, 5 U.S.C.A. s 851. See H.R.Rep. No. 1289, 78th Cong., 2d Sess. 3.

FN5 Disabled veterans had been granted employment preferences in 1865. 13 Stat. 571. This statutory policy was expressly preserved by s 7 of the Civil Service Act of 1883, 22 Stat. 403, 406, 5 U.S.C.A. s 638, was carried forward in other Acts, and has been repeated in a most comprehensive manner in s 2 of the Veterans' Preference Act of 1944.

FN6 It is of interest that this legislative expression, like the one before us, was a proviso in a section, and that the section as a whole had to do with the manner in which the Civil Service Commission should provide for efficiency ratings in relation to promotions, demotions and dismissals of civil service employees.

FN7 s 7, Executive Order 3567, October 24, 1921.

FN8 Executive Order 3801, March 3, 1923.

FN9 Departmental Circular 146, U.S. Civil Service Comm'n, October 22, 1936.

FN10 5 Code Fed.Reg. (Supp.1943) ss 12.301--12.313. These regulations, like those attacked here, separated all civil service employees into different categories according to their tenure, with permanent employees having the highest retention status. Thus all permanent employees, regardless of veteran's preference and of efficiency rating, enjoyed priority over all employees with limited tenures.

FN11 Hearings before Senate Committee on Civil Service on S. 1762 and H.R. 4115, 78th Cong., 2d Sess. 8--9.

FN12 Id. at 29.

FN13 Id. at 27, 29.

FN14 Three veterans' organizations collaborated with the legislative sponsors in drafting the Act. Hearings before Senate Committee on Civil Service on S. 1762 and H.R. 4115, 78th Cong., 2d Sess. 8. A representative of one of these organizations stated to the Committee: 'This measure gives to honorably discharged veterans of World War I and World War II, their widows, and the wives of disabled veterans who themselves are not qualified, preference in employment where Federal funds are disbursed. It provides, by law, a definite preference both in appointment and retention in Federal positions. While such a preference in many instances now exists by virtue of Executive orders and Civil Service Commission regulations, this bill gives such preference a permanent standing that cannot be changed except by congressional action. The bill, likewise, does not take away from the veteran any rights previously granted under any existing law, Executive order, civil-service rule, or regulation of any department of the Government, but prescribes by law additional preferences and confirms many now existing by regulation.' Id. at 41--42.

FN15 90 Cong.Rec. 3502, 3503, 3505.

FN16 Hearings before Senate Committee on Civil Service on S. 1762 and H.R. 4115, 78th Cong., 2d Sess. 33--34.

FN17 Id. at 63, 65.

FN18 It is worthy of note, however, that Congress, in recognition of hardships resulting from replacement of older government employees by veterans, hass passed Acts which grant special pensions to employees over 55 years of age who have worked for the Government for 25 years or more and who have been involuntarily separated from the service in reductions in force. 60 Stat. 939, 5 U.S.C.A. s 691(e); Pub.L. No. 426, 80th Cong., 2d *1029. Sess., Feb. 28, 1948, 5 U.S.C.A. s 691 et seq. See 90 Cong.Rec. 9201--9202, H.R. No. 2443, 79th Cong., 2d Sess. 1, S.Rep. No. 1678, 79th Cong., 2d Sess. 1--2.

FN1 Depending upon whether s 8 of the Selective Training and Service Act of 1940, 54 Stat. 890, 50 U.S.C.App. s 301, et seq., 50 U.S.C.A.Appendix, s 301 et seq., requiring restoration to employment and forbidding discharge without cause for one year, has been qualified by the later enactment of s 12 of the Veterans' Preference Act, 58 Stat. 390, 5 U.S.C., Supp.1946, s 861, 5 U.S.C.A. s 861, quoted in the Court's opinion, particularly the

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second proviso. See note, 2.

FN2 The second proviso, cf. note 1, specifies that preference employees (i.e., veterans) with efficiency ratings of 'good' or better shall be retained in preference to 'all other competing employees,' a designation certainly of the most comprehensive scope. The very terms of the section appear thus to place much greater stress upon efficiency ratings than upon length of service.

FN3 The practice in relation to these positions has been to withhold efficiency ratings, in this case, for a period of six months, and then to award them on the basis of actual performance.

FN4 Ordinarily, of course, rights are to be determined as of the time the interests involved are adversely affected. But it would seem hardly consistent with the legislative scheme that employees with deferred status could defeat the use of a reasonable period to determine the veteran's efficiency rating by actual performance. In any event, the discretionary declaratory judgment remedy should not be applied to oust preference employees entitled to priority over others, even though their status as preference employees is established after trial but before final disposition of the cause of appellate review.

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*2510 452 U.S. 549, 107 L.R.R.M. (BNA) 2633,
69 L.Ed.2d 226,
91 Lab.Cas. P 12,796

Roger D. MONROE, Petitioner,
v.
The STANDARD OIL COMPANY.

No. 80-298.
Argued March 4, 1981.
Decided June 17, 1981.

Plaintiff, a refinery employee who was a military reservist, brought suit against employer under Vietnam Era Veterans' Readjustment Allowance Act. The United States District Court for the Northern District of Ohio, 446 F.Supp. 616, Don J. Young, J., granted summary judgment to employee-reservist, and employer appealed. The Court of Appeals for the Sixth Circuit, 613 F.2d 641, reversed, and writ of certiorari was granted. The Supreme Court, Justice Stewart, held that section of Act providing that any employee of a private employer shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the armed forces did not require employer to make work schedule accommodations for employee-reservist not made for other employees.

Affirmed.

Chief Justice Burger filed a dissenting opinion, in which Justice Brennan, Justice Blackmun and Justice Powell joined.

1. ARMED SERVICES k115(7)
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k115 Veterans Entitled
34k115(7) Leaving position for training or service.

U.S.Ohio 1981.
Both ready reservists and national guardsmen are equally entitled to protection of section of Vietnam Era Veterans' Readjustment Allowance Act providing that any employee of a private employer shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the armed forces. 38 U.S.C.A. Secs. 2021(b)(3), 2024(d).

2. ARMED SERVICES k118(1)
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k118 Position Restorable
34k118(1) In general.

U.S.Ohio 1981.
Provision of Vietnam Era Veterans' Readjustment Allowance Act compelling employers to grant leaves of absence to employees who must attend reserve training and entitling reservist who has been absent for inactive reserve training to benefits upon his return which automatically would have accrued if he had remained in the continuous service of his employer does not entitle reservist to benefits that are conditioned upon work requirements demanding actual performance on the job. 38 U.S.C.A. Sec. 2024(d).

3. ARMED SERVICES k120
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k120 Discharge.

U.S.Ohio 1981.
Provision of Vietnam Era Veterans' Readjustment Allowance Act that any employee of a private employer shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the armed forces was enacted for the significant but limited purpose of protecting employee-reservists against discriminations like discharge and demotion, motivated solely by reserve status. 38 U.S.C.A. Sec. 2021(b)(3).

4. ARMED SERVICES k118(1)
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k118 Position Restorable
34k118(1) In general.

U.S.Ohio 1981.
Provision of Vietnam Era Veterans' Readjustment Allowance Act that any employee of a private employer shall not be denied retention in employment or any promotion or other incident or advantage of

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employment because of any obligation as a member of a reserve component of the armed forces does not require private employer to make work-scheduling accommodations for employee-reservist not made for other employees. 38 U.S.C.A. Sec. 2021(b)(3).

2511 Syllabus (FN)

The Vietnam Era Veterans' Readjustment Assistance Act of 1974 provides in 38 U.S.C. Sec. 2021(b)(3) that any employee of a private employer "shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the Armed Forces." Petitioner was an employee in respondent's refinery, which operated 24 hours a day, every day of the year, and whose employees worked five 8-hour days weekly but in a different 5-day sequence each week. As a military reservist, petitioner had to attend training with his unit one weekend a month and for two weeks each summer. On a number of weekends, petitioner was required to attend training on days when he was scheduled to work at the refinery, and in most instances he was unable to exchange shifts with other employees as he was permitted to do. Respondent provided him with leaves of absence to attend training, as required by 38 U.S.C. Sec. 2024(d), but it did not pay him for the hours he did not work nor did it take steps to permit him to make up those hours by working outside the normal schedule. Petitioner brought an action against respondent in Federal District Court, alleging, inter alia, that respondent had violated Sec. 2021(b)(3). The District Court granted summary judgment for petitioner on the ground that respondent, by not scheduling petitioner for a full 40-hour week on those occasions when he was unable to exchange shifts, had denied him "an incident or advantage of employment" within the meaning of Sec. 2021(b)(3), and awarded him an amount for wages lost on those "work dates when an accommodation should have been made." The Court of Appeals reversed, holding that respondent had taken no discriminatory action proscribed by Sec. 2021(b)(3).

Held : Section 2021(b)(3) does not require an employer to make work-scheduling accommodations for employee-reservists not made for other employees. Pp. 2514-2519.

(a) The legislative history indicates that Sec. 2021(b)(3) was enacted for the significant but limited purpose of protecting the employee-reservist from discrimination like discharge and demotion motivated [452 U.S. 550] solely by reserve status. There is nothing in Sec. 2021(b)(3) or its legislative history to indicate that Congress even considered imposing an obligation on employers to provide a special work-scheduling preference, but rather the history suggests that Congress did not intend employers to provide special benefits to employee-reservists not generally *2512 made available to other employees. Pp. 2514-2518.

(b) While this case involves absences for weekend duty, Sec. 2021(b)(3) refers to "any obligation as a member of a Reserve component." Accordingly, there is no principled way of distinguishing between an employer's obligation to make scheduling accommodations for weekends as opposed to, for example, annual 2-week training periods, or even longer periods of training or duty. There is nothing in the legislative history to indicate that Congress intended reservists to be entitled to all "incidents and advantages of employment" accorded during their absence to working employees, including regular time and overtime pay. P. 2518.

(c) There is nothing in the statute or its history to support petitioner's contention that Sec. 2021(b)(3) only requires an employer under the circumstances of this case to make a "reasonable accommodation" to employee-reservists. Such a "reasonable accommodation" has already been made in Sec. 2024(d) by requiring employers to grant a leave of absence to reservists whose duties force them to miss time at work. To say that Sec. 2021(b)(3) would be of little significance unless a "reasonable accommodation" requirement is imposed, ignores the fact that the nondiscrimination requirements of the section already impose substantial obligations on employers by precluding them from ridding themselves of the inconveniences and productivity losses resulting from employee-reservists' absence by discharging or otherwise disadvantaging such employees solely because of their military obligations. Pp. 2518-2519.

6th Cir. 613 F.2d 641, affirmed.

Alan I. Horowitz, Washington, D.C., for petitioner.

[452 U.S. 551] Paul S. McAuliffe, Cleveland, Ohio, for respondent.

Justice STEWART delivered the opinion of the Court.

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The Court of Appeals for the Sixth Circuit concluded that 38 U.S.C. Sec. 2021(b)(3), a provision of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, does not require an employer to provide preferential scheduling of work hours for an employee who must be absent from work to fulfill his military reserve obligations. 613 F.2d 641. We granted certiorari to consider the petitioner's contention that an employer has a statutory duty to make work-scheduling accommodations for reservist-employees not made for other employees, whenever such accommodations reasonably can be accomplished. 449 U.S. 949, 101 S.Ct. 352, 66 L.Ed.2d 213. (FN1)

I

In 1975 and 1976, the years pertinent to this litigation, the petitioner was a full-time employee in the respondent's continuous process refinery in Lima, Ohio. The refinery was operated 24 hours a day, 7 days a week, 365 days a year. To insure that the burdens of weekend and shift work would be equitably divided among its employees over the course of a year, the respondent scheduled its employees to work five 8-hour days in a row weekly, but in a different 5-day sequence each week. Under the respondent's collective agreement with its union, however, an employee could, with the acquiescence of his foreman and if the change did not require the payment of overtime, exchange shifts with another employee.

[1] During the same period, the petitioner was a military reservist, (FN2)[452 U.S. 552]] and had to *2513 attend training with his unit one weekend a month and for two weeks each summer. On a number of weekends, the petitioner was required to attend training on days when he was scheduled to work at the refinery. Although the petitioner was able on four of these occasions to exchange shifts with other employees, he was unable to make such an exchange in most instances. The respondent provided him with leaves of absence to attend training, as 38 U.S.C. Sec. 2024(d) (FN3) required it to do, but it did not pay him for the hours he did not work, nor did it take steps to permit him to make up those hours by working outside his normal schedule. When the petitioner was on a leave of absence and could not arrange a switch with another employee, the respondent would make arrangements to fill the vacancy created by the petitioner's absence, arrangements often requiring the payment of overtime wages to the substitute.

In 1976, the petitioner (FN4) brought this action against the respondent alleging that it had violated the provisions of 38 U.S.C. Secs. 2021(b)(3) (FN5) and 2024(d). Noting that the [452 U.S. 553] first of these sections provides that an employer may not deny a military reservist in his employ any "incident or advantage of employment" because of the employee's obligations to the Reserves, and finding that "being scheduled for a full forty hour week at the [respondent's] refinery constitutes an incident or advantage of employment," the District Court for the Northern District of Ohio granted summary judgment to the petitioner. 446 F.Supp. 616, 618, 619. The court awarded petitioner $1,086.72 for wages lost on those "work dates when an accommodation should have been made." Id., at 619. (FN6)

[2] The Court of Appeals for the Sixth Circuit reversed. 613 F.2d 641. First, it determined that the respondent had met the requirements of Sec. 2024(d). (FN7) It noted that this section "guarantees terms and conditions of reemployment to reservists returning from inactive duty training," but found that "[i]t does not, however, protect reservists from discrimination by their employers between training assignments." Id., at 643-644.

Next, the Court of Appeals rejected the District Court's [452 U.S. 554] interpretation of Sec. 2021(b)(3). It held that this section "merely requires that reservists be treated *2514 equally or neutrally with their fellow employees without military obligations." Id., at 646. The appellate court then concluded that the respondent had taken no discriminatory action that is proscribed by Sec. 2021(b)(3):

> "The requirement of equal treatment was met in the present case. The parties agreed that appellee was regularly scheduled for forty-hour workweeks, as were his fellow employees. Further, Monroe was scheduled for weekend work in accordance with Sohio's established practice of rotating shifts to insure that all employees would work approximately an equal number of weekend days. Finally, he was treated the same as his coworkers with regard to the right to exchange shifts with other employees." Id., at 646.

II

This case presents the first occasion this Court has had to address issues arising from the statutory

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provisions, codified at 38 U.S.C. Sec. 2021 et seq., specifically dealing with military reservists. (FN8) We have, however, frequently interpreted the somewhat analogous statutory provisions entitling the returning regular veteran to reinstatement with his "seniority, status and pay" intact, 38 U.S.C. Sec. 2021(a), most recently in Coffy v. Republic Steel Corp., 447 U.S. 191, 100 S.Ct. 2100, 65 L.Ed.2d 53, and Alabama Power Co. v. Davis, 431 U.S. 581, 97 S.Ct. 2002, 52 L.Ed.2d 595.

A

Statutory re-employment rights for veterans date from the Nation's first peacetime draft law, passed in 1940, which provided that a veteran returning to civilian employment [452 U.S. 555] from active duty was entitled to reinstatement to the position that he had left or one of "like seniority, status, and pay." 38 U.S.C. Sec. 2021(a). In 1951, in order to strengthen the Nation's Reserve Forces, Congress extended reinstatement rights to employees returning from training duty. See Pub. L. 51, ch. 144, Sec. 1(s), 65 Stat. 75, 86-87. Thereafter, the Reserve Forces Act of 1955, Pub.L. 305, ch. 665, Sec. 262(f), 69 Stat. 598, 602, provided that employees returning from active duty of more than three months in the Ready Reserve were entitled to the same employment rights as inductees, with limited exceptions. In 1960, these re-employment rights were extended to National Guardsmen, Pub.L. 86-632, 74 Stat. 467. See 38 U.S.C. Sec. 2024(c). In addition, a new section, now codified at 38 U.S.C. Sec. 2024(d), was enacted in 1960 to deal with problems faced by employees who had military training obligations lasting less than three months. This section provides that employees must be granted a leave of absence for training and, upon their return, be restored to their position "with such seniority, status, pay, and vacation" as they would have had if they had not been absent for training.

Section 2024(d) closely paralleled 38 U.S.C. Sec. 2021(a), the latter section ensuring the reinstatement of regular veterans returning from active duty. (FN9) But Sec. 2024(d) did not [452 U.S. 556] provide reservists with protection *2515 against discharges, demotions, or other discriminatory conduct once reinstated. Section 2021(b)(2), on the other hand, provided regular veterans returning from active duty one year's "protection ... against certain types of discharges or demotions that might rob the veteran's reemployment of its substance." Oakley v. Louisville & Nashville R. Co., 338 U.S. 278, 285, 70 S.Ct. 119, 123, 94 L.Ed. 87. The legislative history of Sec. 2021(b)(3) indicates that it was designed to provide similar protection to employee-reservists. (FN10)

[452 U.S. 557] B

Section 2021(b)(3) provides in pertinent part:

> "Any person who [is employed by a private employer] shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces."

The Senate Report on the bill that became Sec.2021(b)(3), stated that the purpose of the enactment was 'to prevent reservists and National Guardsmen not on active duty who must attend weekend drills or summer training from being discriminated against in employment because of their Reserve membership....' S. Rep. No. 1 477, 90th Cong., 2d Sess., 1-2 (1968). The Report explained that '[e]mployment practices that discriminate against employees with Reserve obligations have become an increasing problem in recent years. Some of these employees have been denied promotions because they must attend weekly drills or summer training [452 U.S. 558] and others have been discharged because of these obligations.... *2516 [T]he bill is intended to protect members of the Reserve components of the Armed Forces from such practices.' Id., at 2. The protection was to be accomplished by entitling reservists 'to the same treatment afforded their co-workers not having such military obligations....' Ibid.

The House Report announced the same motivation. The bill was described as providing "job protection for employees with obligations as members of a reserve component." H. R. Rep. No. 1303, 90th Cong., 2d Sess., 3 (1968). The House Report elaborated as follows:

> "Section (1) amplifies existing law to make clear that reservists not on active duty, who have a remaining Reserve obligation, whether acquired voluntarily or involuntarily, will nonetheless not be discriminated against by their employees [sic] soley [sic] because of such Reserve affiliation.
>
> "It assures that these reservists will be entitled to the same treatment afforded their coworkers without such military obligation.

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"The law does not now protect these reservists against discharge without cause, as it does with inductees and enlistees, who have 1-year protection, and initial active duty for training reservists, who have 6 months' protection." Ibid. (emphasis added).

The legislation was originally proposed by the Department of Labor. Accordingly, the testimony of Hugh W. Bradley, Director of the Office of Veterans' Reemployment Rights of the Labor Department, who was the chief administration spokesman for the provision, is instructive. He described the relevant portions of the legislation to the House Committee on Armed Services:

"The first provision of the bill deals with a problem that has been increasingly difficult in the past few years. It is designed to enable reservists and guardsmen who leave[452 U.S. 559] their jobs to perform training in the Armed Forces, to retain their employment and to enjoy all of the employment opportunities and benefits accorded their coworkers who do not have military training obligations. The law does not now protect them against discharge without cause as it does inductees and enlistees, who have 1-year protection, and initial active duty for training reservists, who have 6 months' protection." 1966 House Hearings, at 5312 (emphasis added).

See also 1968 House Hearings, at 7471.

Testimony by Rear Admiral Burton H. Shupper, U.S.N., appearing on behalf of the Department of Defense, also reflected the purposes behind the enactment:

"The other aspect of H. R. 11509 is the provision that employees shall not be denied retention in employment or advantages of employment because of any obligation as a member of a Reserve component of the Armed Forces. After the Berlin and Cuba callups, we received information from our Reserve community that a significant number of reservists were receiving indications that opportunities for advancement and retention in civilian employment would favor those who appear to offer their employers more continuity of services, namely those in the Standby Reserve or those with no Reserve status. In fairness, we must emphasize that this reaction on the part of employers appears to be the exception not the rule and, we believe, is generally not based upon unpatriotic motives but rather on the competitive spirit of business." 1966 House Hearings, at 5315.

[3] The legislative history thus indicates that Sec. 2021(b)(3) was enacted for the significant but limited purpose of protecting the employee-reservist against discriminations like discharge and demotion, motivated solely by reserve status. Congress wished to provide protection to reservists comparable[452 U.S. 560] to that already protecting the regular veteran from "discharge without cause"--to insure that employers would not penalize or rid themselves of returning reservists after a mere pro forma compliance with *2517 Sec. 2024(d). (FN11) and the consistent focus of the administration that proposed the statute, and of the Congresses that considered it, was on the need to protect reservists from the temptation of employers to deny them the same treatment afforded their co-workers without military obligations. The petitioner's contention that his employer was obliged to provide work-schedule preferences not available to other employees must be considered against this legislative background.

C

[4] The petitioner's argument is that the respondent corporation was obligated to make special efforts to schedule his work hours so he would avoid any lost time by reason of his reserve obligations. He does not allege that the respondent singled him out unfairly, or in any other way discriminated [452 U.S. 561] against him vis-a-vis other employees in the scheduling of work. Indeed, the petitioner's argument would require work-assignment preferences not available to any nonreservist employee at the respondent's refinery.

The problem with the petitioner's position is that there is nothing in Sec. 2021(b)(3) or its legislative history to indicate that Congress ever even considered imposing an obligation on employers to provide a special work-scheduling preference. Indeed, the legislative history, set out above, strongly suggests that Congress did not intend employers to provide special benefits to employee-reservists not generally made available to other employees. (FN12) Congress, and the administration spokesman for the legislation, stated explicitly that reservists were to be entitled "to the same treatment afforded their co-workers not having such military obligations...." S. Rep. No. 1477, 90th Cong., 2d Sess., 2 (1968); see also H. R. Rep. No. 1303, 89th Cong., 2d Sess., 3

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(1966); 1968 House Hearings, at 7471 (testimony of Hugh W. Bradley).

The strongest language culled by the petitioner from the legislative history to support his argument is a single passage in the 1966 House Report on H. R. 11509: "If these young men are essential to our national defense, then certainly our Government and employers have a moral obligation to see that their economic well being is disrupted to the minimum extent possible." H. R. Rep. No. 1303, 89th Cong., 2d Sess., 3 (1966). (FN13) But this generalized statement *2518 appears [452 U.S. 562] only in the 1966 House Report; it is not contained in either the House or the Senate Report that accompanied the bill as finally enacted in the 90th Congress. Compare ibid. with H. R. Rep. No. 1303, 90th Cong., 2d Sess., 3, 8 (1968), and S. Rep. No. 1477, 90th Cong., 2d Sess., 3 (1968). Moreover, language in the same 1966 House Report specifically indicated that only a nondiscrimination measure was intended: "It should be noted that the only substantive changes in existing law relate to ... the prohibition against employer discrimination against reservists who participate in the Reserve or National Guard programs." H. R. Rep. No. 1303, 89th Cong., 2d Sess., 4 (1966).

It appears that the origin of the passage the petitioner relies on is a statement by Hugh W. Bradley before the House Committee in 1966. See 1966 House Hearings, at 5313. Yet this passage disappeared from Bradley's presentation to both the House and Senate Committees in the subsequent Congress. See 1968 House Hearings, at 7471, 7472; 1968 Senate Hearings, at 2, 3. And in all three of his congressional appearances, Bradley made it abundantly clear that the purpose of the legislation was to protect employee reservists from discharge, denial of promotional opportunities, or other comparable adverse treatment solely by reason of their military obligations; there was never any suggestion of employer responsibility to provide preferential treatment. In any case, the language relied on by the petitioner hardly supports a finding that Congress intended Sec. 2021(b)(3) to convert a generalized moral obligation into a specific legal duty.

D

Aside from a lack of support in legislative history, the petitioner's argument suffers other flaws. While the present case [452 U.S. 563] involves absences for weekend duty, the statutory language is not so limited; it refers to "any obligation as a member of a Reserve component...." Section 2021(b)(3) has been applied, for example, to 2-week summer camps, Carney v. Cummins Engine Co., 602 F.2d 763 (CA7); 6-week training sessions, Carlson v. New Hampshire Dept. of Safety, 609 F.2d 1024 (CA1); and two-month training sessions, Peel v. Florida Dept. of Transportation, 443 F.Supp. 451 (ND Fla.), aff'd, 600 F.2d 1070 (CA5). Accordingly, there is no principled way of distinguishing between an employer's obligation to make scheduling accommodations for weekends as opposed to, for example, annual 2-week training periods, or even longer periods of training or duty. And certainly there is nothing in the legislative history that would indicate Congress intended that reservists were to be entitled to all "incidents and advantages of employment" accorded during their absence to working employees, including regular time and overtime pay. (FN14)

The petitioner concedes that it might be impossible, or at least unduly burdensome, to accommodate a reservist's absences for periods as long as the mandatory 2-week summer training session. Perhaps for this reason, he attempts to limit the obvious implications of his theory by arguing that [452 U.S. 564] "the statute only requires an employer to take reasonable steps to accommodate the reservists." But, as is true of the petitioner's more general affirmative obligation theory, there is nothing in the statute or its history to support such a notion.

*2519 Indeed, a "reasonable accommodation" to employee-reservists because of missed worktime has already been made by Congress in Sec. 2024(d). There, Congress decided what allowance employers should make to reservists whose duties force them to miss time at work: provide them a leave of absence. If Congress had wanted to impose an additional obligation upon employers, guaranteeing that employee-reservists have the opportunity to work the same number of hours, or earn the same amount of pay that they would have earned without absences attributable to military reserve duties, it could have done so expressly. (FN15) By contrast, there is no evidence that the Congress that enacted Sec. 2021(b)(3) showed any concern with the problem of missed work hours, let alone imposed any duty to "take reasonable steps to accommodate the reservists" in this or any other respect.

The petitioner makes no suggestion why his theory of "reasonable accommodation" should apply only to

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"incidents or advantages of employment," and not to the other provisions of Sec. 2021(b)(3): retention and promotion. Presumably, if it applies to one provision of the section, it should apply to them all. But if an employer could, for example, defend a [452 U.S. 565] denial of promotion to an employee-reservist because the promotion could not be "reasonably accommodated," the protection afforded by Sec. 2021(b)(3) would clearly be reduced, if not altogether eliminated.

Finally, the petitioner suggests that Sec. 2021(b)(3) must have the meaning he attributes to it, because the section would otherwise be of little significance. But the nondiscrimination requirements of the section impose substantial obligations upon employers. The frequent absences from work of an employee-reservist may affect productivity and cause considerable inconvenience to an employer who must find alternative means to get necessary work done. Yet Congress has provided in Sec. 2021(b)(3) that employers may not rid themselves of such inconveniences and productivity losses by discharging or otherwise disadvantaging employee-reservists solely because of their military obligations.

III

This Court does not sit to draw the most appropriate balance between benefits to employee-reservists and costs to employers. That is the responsibility of Congress. If Congress desires to amend Sec. 2021(b)(3) to require special work-hour scheduling for military reservists where it is reasonably possible, it is free to do so. But we must deal with the law as it is.

The respondent did not deny the petitioner anything that he would have received had he not been a reservist. He was scheduled for 40 hours work a week, as all other employees in the refinery were. (FN16) He was assigned the same burden of weekend and shift work as were his fellow employees. And he was allowed to exchange shifts in the manner[452 U.S. 566] accepted by his union and the respondent, just as all other employees were. (FN17) Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

*2520 Chief Justice BURGER, with whom Justice BRENNAN, Justice BLACKMUN, and Justice POWELL join, dissenting.

The Court today unduly restricts the employment protections accorded Ready Reservists and National Guardsmen by Congress. In my view, the Court's decision is based upon an erroneous interpretation of 38 U.S.C. Sec. 2021(b)(3) and, in effect, allows employees to be penalized for their service in the military contrary to congressional intent.

I

A

As in any case involving statutory construction, "our starting point must be the language employed by Congress." Reiter v. Sonotone Corp., 442 U.S. 330, 337, 99 S.Ct. 2326, 2330, 60 L.Ed.2d 931 (1979). Title 38 U.S.C. Sec. 2021(a) requires that a veteran returning to civilian employment after military duty be restored to the position he previously held or to "a position of like seniority, status, and pay." In addition, 38 U.S.C. Sec. 2021(b)(1) provides that the veteran's reinstatement must be "without loss of seniority" and that he "shall not be discharged from such position without cause within one year after such restoration or reemployment." See Oakley v. Louisville & Nashville R. Co., 338 U.S. 278, 284-285, 70 S.Ct. 119, 122-23, 94 L.Ed. 87 (1949). Similar safeguards are granted in 38 U.S.C. Sec. 2024(c) to members of "a Reserve component of the Armed Forces" who have military obligations lasting more than three months. As to reservists whose [452 U.S. 567] commitments are less than three months, 38 U.S.C. Sec. 2024(d) provides in pertinent part:

> "Any employee ... shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes."

Additional guarantees for reservists are contained in 38 U.S.C. Sec. 2021(b)(3), on which petitioner bases his claim for nonconflicting work hours. Section 2021(b)(3) states:

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"Any person who [is employed by the Federal *Government*, a *state government*, or a private employer] shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces." (Emphasis added.)

The Court concludes that "Sec. 2021(b)(3) was enacted for the ... limited purpose of protecting the employee-reservist against discriminations like discharge and demotion motivated solely by reserve status." Ante, at 2516. Yet the plain language of the statute belies such a narrow interpretation. Although Sec. 2021(b)(3) proscribes the termination of a reservist because of his military obligations, it also expressly prohibits the denial of "any promotion or other incident or advantage of employment." Such protection is clearly broader than that enjoyed by returning veterans under Sec. 2021(b)(1), but is understandable because the reservist has continuing [452 U.S. 568] military commitments requiring his absence that may disadvantage him in his employment.

B

Just as the language of Sec. 2021(b)(3) does not demonstrate a congressional intent to confine the statute's application to "discriminations like discharge and demotion," neither does the legislative history. When the bill, H.R. 11509, 89th Cong., 1st Sess. (1965), that included what eventually became 38 U.S.C. Sec. 2021(b)(3) was first introduced, Subcommittee No. 3 of the House Committee on Armed Services held hearings and the full Committee thereafter reported *2521 favorably on the bill. The Committee's Report, which reflected the hearing testimony of Hugh W. Bradley, Director of the Office of Veterans' Reemployment Rights of the Department of Labor, stated:

"Employment practices which disadvantage employees with Reserve obligations have become an increasing problem in recent years. Paragraph 1 of the bill will protect members of the Reserve components of the Armed Forces, including the National Guard, from such practices. It is designed to enable reservists and guardsmen who leave their jobs to perform training in the Armed Forces to retain their employment and to enjoy all of the employment opportunities and benefits accorded their coworkers who do not ... have a Reserve obligation.

"It assures that these reservists will be entitled to the same treatment afforded their coworkers without such military obligations ....

"The law does not now protect these reservists against discharge without cause as it does with inductees and enlistees, who have 1-year protection, and initial active duty for training reservists, who have 6 months' protection.

"To give the reservist a specific period of protection after each tour of training duty would be to perpetuate [452 U.S. 569] him in his position indefinitely. The new section ... would not follow this approach but instead provides that an employee shall not be denied retention in his employment or any promotion or other incident or advantage of employment solely because of any obligation as a member of a Reserve component of the Armed Forces.

* * *

"If these young men are essential to our national defense, then certainly our Government and employers have a moral obligation to see that their economic well being is disrupted to the minimum extent possible." H.R.Rep.No. 1303, 89th Cong., 2d Sess., 3 (1966) (emphasis added).

Although the bill was passed by the House, 112 Cong.Rec. 5017 (1966), the Senate took no action on the measure during the 89th Congress.

The bill was reintroduced in the 90th Congress. H.R. 1093, 90th Cong., 1st Sess. (1967); S. 2561, 90th Cong., 1st Sess. (1967). Hearings again were held before Subcommittee No. 3 of the House Committee on Armed Services, at which a statement expressing the view of the American Legion was entered on the record:

"The American Legion feels very strongly that employees with reserve obligations who are members of the National Guard and the Reserves ... should be afforded all the employment opportunities and benefits as those who do not have training obligations ....

"[The new section] would prevent discharge from employment without cause because of membership in the National Guard or Reserves, and would also prevent discrimination in such

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areas as promotion, training opportunities and pay increases." Hearings on H.R. 1093 before Subcommittee No. 3 of the House Committee on Armed Services, 90th Cong., 1st Sess., 7477 (1968), U.S.Code Cong. & Admin.News 1968, p. 3421 (emphasis added).

[452 U.S. 570] Noting that protection of "reservists and guardsmen from being disadvantaged in employment because of their military obligations" was one of the purposes of the bill, the full Committee's favorable Report explained that "[s]ection (1) amplifies existing law to make clear that reservists not on active duty, who have a remaining Reserve obligation, whether acquired voluntarily or involuntarily, will nonetheless not be discriminated against by their employees [sic] soley [sic] because of such Reserve affiliation." H.R.Rep.No. 1303, 90th Cong., 2d Sess., 3 (1968) (emphasis added).

Following passage of the bill by the House, 114 Cong.Rec. 11779 (1968), the Senate Committee on Armed Services held hearings and issued a Report recommending enactment. The Report repeated the themes which run through every congressional expression on the statutory proposal:

*2522 "This bill is intended ... to prevent reservists and National Guardsmen not on active duty who must attend weekly drills or summer training from being discriminated against in employment because of their Reserve membership ....

* * *

"Employment practices that discriminate against employees with Reserve obligations have become an increasing problem in recent years. Some of these employees have been denied promotions because they must attend weekly drills or summer training and others have been discharged because of these obligations. Section 1 of the bill is intended to protect members of the Reserve components of the Armed Forces from such practices. It provides that these reservists will be entitled to the same treatment afforded their coworkers not having such military obligations by requiring that employees with Reserve obligations 'shall not be denied retention in employment or other incident or advantage of employment because of any obligation as a member of a Reserve [452 U.S. 571] component of the Armed Forces of the United States.' " S.Rep.No. 1477, 90th Cong., 2d Sess., 1-2, 3421 (1968).

The bill passed the Senate, 114 Cong.Rec. 24017 (1968), and became law on August 17, 1968. Pub.L. 90-491, 82 Stat. 790.

The legislative history of Sec. 2021(b)(3) admittedly reveals an intent to protect reservists from discharge because of their short-term absences, just as Secs. 2021(b)(1) and 2024(c) safeguard returning veterans and reservists who are absent for more than three months. Yet the legislative history also indicates a more expansive congressional purpose of ensuring that reservists are not deprived of any employment benefit solely because of their willingness to serve their country.

II

The benefit at issue here is the opportunity to work a full 40-hour week. Both the District Court and the Court of Appeals concluded that being scheduled to work 40 hours per week is an "incident or advantage" of employment established by the custom and practice at respondent's refinery. 446 F.Supp. 616, 619 (ND Ohio 1975); 613 F.2d 641, 645 (CA6 1980). Petitioner was treated no different from other employees in terms of work scheduling, and he was given the right to exchange shifts with willing fellow employees pursuant to the collective-bargaining agreement. Nevertheless, during those weeks when his scheduled work hours conflicted with his military commitments and he was unable to arrange an exchange of shifts, the opportunity granted him to work a full 40 hours was illusory since respondent "took no steps to provide [him] with substituted hours." App. 26. Thus, petitioner asserts that respondent violated 38 U.S.C. Sec. 2021(b)(3) by refusing to rearrange his work schedule to allow him to work 40 hours during those weeks when his military obligations otherwise precluded him from doing so. I agree.

The Court inaccurately characterizes petitioner's claim as seeking "work-schedule preferences not available to other employees." [452 U.S. 572] Ante, at 2517. Respondent's policy is not to readjust the work schedule to accommodate absences for personal reasons, and petitioner alleges no right to special consideration regarding absences unrelated to military service. But if petitioner is to be placed on an equal footing with his co-workers, his military absences cannot be treated simply as personal leaves of

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absence. See Carlson v. New Hampshire Dept. of Safety, 609 F.2d 1024, 1027 (CA1 1979), cert. denied, 446 U.S. 913, 100 S.Ct. 1844, 64 L.Ed.2d 267 (1980); Lott v. Goodyear Aerospace Corp., 395 F.Supp. 866, 869-870 (ND Ohio 1975). A reservist's absences for training result from obligations vital to our national defense that other employees have not assumed, and the primary purpose of the re-employment rights statutes is to protect reservists against disadvantages in employment caused by these obligations. Indeed, the essence of the statutory guarantees provided by Congress is that employers must give special treatment to the military absences of veterans and reservists.

*2523 The Court emphasizes that "respondent did not deny the petitioner anything that he would have received had he not been a reservist" since he was scheduled for 40 hours of work per week, was assigned the same burden of weekend and shift work as other employees, and was allowed to exchange shifts. Ante, at 2519. In substance, the Court embraces the Court of Appeals' holding that Sec. 2021(b)(3) "merely requires that reservists be treated equally or neutrally with their fellow employees without military obligations." 613 F.2d, at 646. However, unless the statute is read as safeguarding reservists from the adverse effects of facially neutral rules, much of its practical significance is lost. As the United States Court of Appeals for the Fifth Circuit observed in West v. Safeway Stores, Inc., 609 F.2d 147, 149 (1980): "The essence of reserve duty in this context is absence from work. If employers could ... require that workers be present in order to receive certain benefits, then reservists could never secure the benefits or advantages of employment which the Act was [452 U.S. 573] designed to protect." see also carney v. Cummins Engine Co., 602 F.2d 763 (CA7 1979), cert. denied, 444 U.S. 1073, 100 S.Ct. 1018, 62 L.Ed.2d 754 (1980).

Petitioner is not attempting to gain an advantage over his co-workers as a result of his reserve membership. He does not assert a right to be paid for hours he does not work, but asks only that he be given the same meaningful chance as other employees without military commitments to work full time in order to earn a living wage. Moreover, the record contains no evidence that it would be unduly burdensome for respondent, if given adequate notice, to accommodate petitioner's weekend military commitments in scheduling his work hours. In fact, counsel for respondent acknowledged at oral argument that petitioner "could be scheduled with the number of ... Saturdays and Sundays off to accommodate his reserve obligation, without requiring any other employee in the plant to work any more Saturdays and Sundays than they now have to work under the regular routine." Tr. of Oral Arg. 27. See also App. 41-43 (proposed revision of work schedule).

The Court states that one of the flaws in petitioner's argument is that "there is no principled way of distinguishing between an employer's obligation to make scheduling accommodations for weekends as opposed to, for example, annual 2-week training periods, or even longer periods of training or duty." Ante, at 2518. However, petitioner does not claim a right to make up hours, only to work full time during those weeks when he is available to work 40 hours apart from his reserve duties. Far from asking respondent to do the impossible, petitioner contends only that "reasonable steps" must be taken to accommodate him. Brief for Petitioner 24. Yet it is undisputed that respondent made no effort to do so. See App. 26. Cf. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977). I cannot accept the Court's conclusion that such total indifference is in keeping with the underlying purposes and express guarantees of Sec. 2021(b)(3).

[452 U.S. 574] The Court's suggestion that respondent need go no further than the requirements of 38 U.S.C. Sec. 2024(d) in accommodating petitioner--i. e., he must simply be provided "a leave of absence," ante, at 2519--ignores the separate, broader protections of Sec. 2021(b)(3), which was enacted because Sec. 2024(d) was found to be inadequate. In the Court's view, "[i]f Congress had wanted to impose an additional obligation upon employers, guaranteeing that employee-reservists have the opportunity to work the same number of hours, or earn the same amount of pay that they would have earned without absences attributable to military reserve duties, it could have done so expressly." Ante, at 2519. But it was respondent that conferred on its employees the benefit of 40 hours of work per week, and Congress has provided unequivocally that such a benefit cannot be refused a reservist, as it was here, solely because of his military commitments. The plain language of Sec. 2021(b)(3) does not differentiate among employment *2524 benefits, but "makes it ... explicit that a reservist or guardsman cannot be ... denied any promotion or other employment benefit or advantage, because of any obligation arising out of his membership in the reserves [or Guard], or because of his absences from

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work that result from such obligation." U. S. Dept. of Labor, Office of Veterans' Reemployment Rights, Veterans' Reemployment Rights Handbook 114-115 (1970) (emphasis added).

III

We have held that the re-employment rights statutes are "to be liberally construed for the benefit of those who ... serve their country." Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285, 66 S.Ct. 1105, 1111, 90 L.Ed. 1230 (1946). Accord, Coffy v. Republic Steel Corp., 447 U.S. 191, 196, 100 S.Ct. 2100, 2104, 65 L.Ed.2d 53 (1980); Alabama Power Co. v. Davis, 431 U.S. 581, 584, 97 S.Ct. 2002, 2004, 52 L.Ed.2d 595 (1977). It is unfortunate, I think, that the Court's decision today undermines that sound principle. The clear purpose of Congress in enacting Sec. 2021(b)(3) was to expand employment safeguards for reservists and thereby encourage[452 U.S. 575] participation in the Ready Reserves and the National Guard so as to strengthen our national defense effort without increased reliance on active duty personnel through mandatory military service. Yet that aim is severely frustrated if employers can deprive reservists of "an incident or advantage of employment" as important as the opportunity for full-time work undiminished by weekend absences for military training. Congress surely did not intend that petitioner be put to the choice of quitting the Reserves or forgoing the chance to earn the same wages as other employees who do not have military obligations. Section 2021(b)(3) was enacted to prevent the very type of disadvantage that petitioner has suffered. Accordingly, I would reverse the judgment of the Court of Appeals.

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

FN1. There is an apparent intercircuit conflict on this issue. Compare the case under review with West v. Safeway Stores, Inc., 609 F.2d 147 (CA5).

FN2. In oral argument, counsel for the respondent indicated that the petitioner was a member of the Ohio National Guard. This is not apparent in the record, but both Ready Reservists and National Guardsmen are equally entitled to the protection of 38 U.S.C. Sec. 2021(b)(3). See S.Rep. No. 1477, 90th Cong., 2d Sess., 1, 5 (1968); H.R.Rep. No. 1303, 90th Cong., 2d Sess., 3, 6 (1968), U.S.Code Cong. & Admin.News, 1968 p. 3421.

FN3. Title 38 U.S.C. Sec. 2024(d) provides in pertinent part:

> "Any employee ... shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty for training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty for training, ... such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes...."

FN4. The Department of Justice represents the petitioner pursuant to 38 U.S.C. Sec. 2022.

FN5. Section 2021(b)(3) provides:

> "Any person who holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces."

FN6. The petitioner does not urge here that he had to be paid for hours not worked.

FN7. There is no dispute that the respondent has complied with all relevant requirements of Sec. 2024(d). See n. 3, supra. This section compels employers to grant leaves of absence to employees who must attend reserve training, and entitles a reservist who has been absent for inactive reserve training to benefits upon his return, such as wage rates and seniority, which automatically would have accrued if he had remained in the continuous service of his employer. See Aiello v. Detroit Free Press, Inc., 570 F.2d 145, 148 (CA6). It does not entitle a reservist to benefits that are conditioned upon work requirements demanding actual performance on the job. See ibid. See also Foster v. Dravo Corp., 420 U.S. 92, 95 S.Ct. 879, 43 L.Ed.2d 44. Thus, it is not contended that Sec. 2024(d) requires employers to pay absent reservists for hours not worked.

*2524_ FN8. Before their recodification in 1974, the

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veterans' re-employment rights provisions were codified at 50 U.S.C.App. Sec. 459 (1970 ed.) (Sec. 9 of the Military Selective Service Act of 1967). See Coffy v. Republic Steel Corp., 447 U.S. 191, 194, n. 2, 100 S.Ct. 2100, 2103, n. 2, 65 L.Ed.2d 53.

FN9. Section 2021(a) provides as follows:

"In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act [50 U.S.C.App. Secs. 451-473] (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service; and (1) receives a certificate described in section 9(a) of the Military Selective Service Act [50 U.S.C.App. Sec. 459(a)] (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year--

"(A) if such position was in the employ of the United States Government, its territories, or possessions, or political subdivisions thereof, or the District of Columbia, such person shall--

"(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

"(ii) if not qualified to perform the duties of such position, by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of the employer, be offered employment and, if such person so requests, be employed in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case;

"(B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such employee shall--

"(i) if still qualified to perform the duties of such position, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay; or

"(ii) [as in (A)(ii), supra, except for references to the 'employer's successor in interest']."

FN10. The bill that included what became 38 U.S.C. Sec. 2021(b)(3) was introduced in the 89th Congress. H. R. 11509, 89th Cong., 1st Sess. (1965). Hearings were held before Subcommittee No. 3 of the House Committee on Armed Services in February 1966. Hearings on H. R. 11509 before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Sess. (1966) (hereafter 1966 House Hearings). The bill was favorably reported by the full Committee, H. R. Rep. No. 1303, 89th Cong., 2d Sess. (1966), and was passed by the House on March 7, 1966, 112 Cong.Rec. 5016 (1966). No action, however, was taken on the measure by the Senate in the 89th Congress.

The bill was reintroduced in the 90th Congress. H. R. 1093, 90th Cong., 1st Sess. (1967); S. 2561, 90th Cong., 1st Sess. (1967). Hearings were again held before Subcommittee No. 3 of the House Committee, on March 20, 1968. Hearings on H. R. 1093 before Subcommittee No. 3 of the House Committee on Armed Services, 90th Cong., 1st Sess. (1968) (hereafter 1968 House Hearings). The bill was favorably reported by the full Committee on April 24, 1968, H. R. Rep. No. 1303, 90th Cong., 2d Sess. (1968), and initially passed by the House on May 6, 1968, 114 Cong.Rec. 11779 (1968). Hearings were held by the Senate Committee on Armed Services on July 25, 1968. Hearings on H. R. 1093 before Senate Committee on Armed Services, 90th Cong., 2d Sess. (1968) (hereafter 1968 Senate Hearings). The bill was favorably reported by the Committee, S. Rep. No. 1477, 90th Cong., 2d Sess. (1968), on July 26, 1968, and passed the Senate on July 29, 1968, 114 Cong.Rec. 24017 (1968). The Senate concurred in the House amendment. Id., at 24999. The bill was signed into law on August 17, 1968. Pub. L. 90-491, 82 Stat. 790.

The language of that portion of the bill which became Sec. 2021(b)(3) was unchanged throughout its legislative consideration. There was no substantive discussion of the measure on the floor of either chamber. Accordingly, the key portions of the legislative history are the three hearings

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held on the proposed measure and the three Committee Reports.

*2524_ FN11. This same purpose was reflected in a statement in support of the legislation by Austin E. Kerby, the Director of the National Economic Commission of the American Legion:

"The American Legion feels very strongly that employees with reserve obligations who are members of the National Guard and the Reserves should not be denied retention in employment or promotional opportunities solely because of their participation in the Reserve Training Program. They should be afforded all the employment opportunities and benefits as those who do not have training obligations. The Reemployment Rights Statutes do not now protect National Guard members and Reservists as it does inductees and enlistees, who have one-year protection, and initial active duty for training reservists who have six-months protection.

"H. R. 1093 [H. R. 11509 as reintroduced in the 90th Congress, see n. 10, supra] would add a new section, 9(c)(3), under the reemployment provisions of the Universal Military Training and Service Act which would prevent discharge from employment without cause because of membership in the National Guard or Reserves, and would also prevent discrimination in such areas as promotion, training opportunities and pay increases." 1968 Hearings, at 7477 (emphasis added).

FN12. One could argue, of course, that "protection ... against certain types of discharges or demotions that might rob the veteran's reemployment of its substance," Oakley v. Louisville & Nashville R. Co., 338 U.S. 278, 285, 70 S.Ct. 119, 123, 94 L.Ed. 87 (in reference to Sec. 2021(b)(2) but equally relevant here) amounts to preferential treatment. But this sort of treatment, clearly intended by the statute and its legislative history, is better understood as protection against discrimination that would not have occurred were it not for reserve obligations, than as preferential treatment accorded solely because of reserve status.

FN13. The legislative history is barren of any indication that Congress intended employers to compensate employees for work hours missed while fulfilling military reserve obligations, which would of course amount to employee receipt of double compensation for such periods.

FN14. The Veterans' Reemployment Rights Handbook, published by the Office of Veterans' Reemployment Rights in 1970 and still in use today, notes that "[t]he law does not require the employer to pay the employee for the time he is absent for military training duty, or even to make up the difference between his military pay and his regular earnings for that period. In this respect, of course, many employers have adopted voluntary policies or contractual obligations, or are subject to State statutes, which give reservists and guardsmen more than the statute [38 U.S.C. Sec. 2021 et seq.] requires." Id., at 113. And in the many examples in the Handbook addressed to typical problems an employer may confront because of employee military obligations, there is not so much as a hint that an employer has an obligation to adjust an employee's work schedule to make up for time lost because of military obligations.

FN15. Section 403 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. 93-508, 88 Stat. 1594, for example, made specific revisions to the existing provisions of the veterans' re-employment rights laws that impose explicit obligations upon employers with respect to certain disabled veterans of the Vietnam era. 38 U.S.C. Sec. 2012. See S. Conf. Rep. No. 93-1107, p. 34 (1974). See also S. Conf. Rep. No. 93-1240, p. 34 (1974); H. R. Conf. Rep. No. 93-1303, p. 34 (1974); H. R. Conf. Rep. No. 93-1435, p. 35 (1974). Cf. Southeastern Community College v. Davis, 442 U.S. 397, 410-411, 99 S.Ct. 2361, 2369, 60 L.Ed.2d 980.

FN16. We note that the collective agreement between the respondent and the petitioner's union stated that it "defines the normal hours of work and shall not be construed as a guarantee of hours of work per day or per week or of days of work per week."

FN17. Of course, nothing in this opinion prevents an employer from providing special scheduling accommodation to employee-reservists. See n. 14, supra.

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R. E. COX DRY GOODS CO. et al. v. KELLOG et al.

No. 2251.

Court of Civil Appeals of Texas. Waco.

Nov. 28, 1940.

1. Negligence ⇐48

A storekeeper is liable for injuries to customer as result of dangerous situation which had existed long enough for reasonably prudent person, exercising ordinary care in looking after store, to have discovered and removed such situation, though keeper had no actual knowledge or notice of danger or of any fact which would have put reasonably prudent person on inquiry concerning it.

2. Negligence ⇐32(1)

While storekeeper is not insurer of his customers' safety while in store, he must exercise ordinary care to keep store premises in reasonably safe condition for their protection.

3. Negligence ⇐136(24)

In action for injuries to customer, stumbling over sample case set in aisle of defendant's store by traveling salesman soliciting orders therein, evidence *held* sufficient to take to jury question whether defendant failed to exercise ordinary care to discover and remove dangerous situation before plaintiff's injury.

4. Master and servant ⇐330(3)

In action for injuries to store customer, stumbling over sample case set in aisle by traveling salesman alleged to be employed by corporate defendant manufacturing products sold by him as sales agent's employee, evidence *held* insufficient to show such contractual relation between salesman and defendant as to render defendant liable for his negligence under respondeat superior doctrine.

5. Master and servant ⇐301(1)

A "master" is a principal who employs another to perform service in his affairs and controls or has right to control such employee's physical conduct in performance of such service.

See Words and Phrases, Permanent Edition, for all other definitions of "Master".

6. Master and servant ⇐301(1)

A "servant" is person employed by master to perform service in his affairs and whose physical conduct in performance of such service is controlled or subject to right of control by master.

See Words and Phrases, Permanent Edition, for all other definitions of "Servant".

7. Master and servant ⇐318(1)

An "independent contractor" is person who contracts with another to do something for him, but is not controlled by such other, nor subject to his right of control, with respect to contractor's physical conduct in performance of undertaking.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Contractor".

8. Master and servant ⇐318(1)

An exclusive state agent for sale of corporation's products on commission basis, without being subject to corporation's control or direction as to manner of carrying on such business, except as to prices and terms of sale, was "independent contractor", not "servant", of corporation, so that it is not liable for injuries to store customer as result of negligence of traveling salesman employed by such agent in setting sample case in aisle of store, though agency contract was terminable by corporation at will, and agent, at time of accident, was also corporation's vice president and sales manager under contract permitting him to continue operation of such commission business as individual project.

9. Master and servant ⇐318(1)

An employer has right to exercise such control over independent contractor as is necessary to secure performance of contract according to its terms and accomplish results contemplated thereby, without creating relationship of master and servant between them, so long as employer does not destroy contractor's power of initiation, nor undertake to control him in means and manner of performing work.

10. Corporations ⇐316(1)

A contract, fairly entered into by all parties, whereby corporation's exclusive sales agent in certain territory on commission basis became its vice president and sales manager while continuing to operate such commission business as his individual project, should be observed by courts.

11. Corporations ⇐425(5)

A corporation held not "estopped" to deny that traveling salesman, employed by

one having exclusive state agency for sale of such corporation's products on commission basis, was corporation's agent and representative, whose negligence, resulting in injury to store customer, did not render corporation liable over to storekeeper for amount of damages recovered, in absence of showing that storekeeper was induced to act to its prejudice on implied representations of such salesman's agency for corporation.

See Words and Phrases, Permanent Edition, for all other definitions of "Estopped".

12. Principal and agent ⇐25(1)

One seeking to avail himself of benefit of doctrine of "agency by estoppel" must show that he was induced to act to his prejudice on implied representations of agency.

See Words and Phrases, Permanent Edition, for all other definitions of "Agency by Estoppel".

13. Pleading ⇐111

In action against two defendants, only one of whom resides in county wherein suit was filed, plaintiff must prove valid cause of action against such defendant. Vernon's Ann.Civ.St. art. 1995, § 29a.

14. Venue ⇐26

In action against store company, traveling salesman, and foreign corporation, alleged to be such salesman's employer, for injuries to store customer as result of salesman's negligence in placing sample case in aisle of store, plaintiff, failing to establish valid case against defendant foreign corporation, could not hold salesman in same suit on ground that he was necessary party, and venue of store company's cross-action against foreign corporation and salesman, who did not reside in county wherein suit was brought, could not be maintained in such county as against salesman, who did not commit "trespass" therein within meaning of venue statute. Vernon's Ann.Civ.St. art. 1995, §§ 4, 9, 29a.

See Words and Phrases, Permanent Edition, for all other definitions of "Trespass".

Appeal from District Court, Nineteenth District, McLennan County; R. B. Stanford, Judge.

Action by P. S. Kellog and another against the R. E. Cox Dry Goods Company, W. H. Radebaugh, and Harriet Hubbard Ayer, Inc., to recover damages for personal injuries, in which defendant dry goods company filed a cross-action for judgment over against codefendants, and defendant Ayer filed a cross-action for judgment over against defendant dry goods company. From a judgment for plaintiff against defendants dry goods company and Ayer and a judgment over for defendant dry goods company against defendant Ayer, defendants dry goods company and Ayer appeal.

Judgment for plaintiff against defendant Ayer set aside, judgment for defendant Ayer rendered, judgment for defendant dry goods company against defendant Ayer reversed, judgment for defendant Ayer on defendant dry goods company's cross-action rendered, and judgment affirmed in all other respects.

Jos. W. Hale, Sleeper, Boynton & Kendall, and Naman, Howell & Boswell, all of Waco, for appellants.

Bryan & Maxwell and Orville Jobe, all of Waco, for appellees.

ALEXANDER, Justice.

This is an action for damages for personal injuries. There was evidence that W. H. Radebaugh, a traveling salesman, while in R. E. Cox Dry Goods Company store in Waco soliciting an order for products manufactured by Harriet Hubbard Ayer, Inc., set his sample cases in the aisle and that Mrs. Kellog stumbled over one of them and was severely injured. Mrs. Kellog sued Radebaugh and his alleged employer, Harriet Hubbard Ayer, Inc., hereinafter referred to as "Ayer," and R. E. Cox Dry Goods Company, hereinafter referred to as "Cox," for damages. Cox asked for judgment over and against Radebaugh and Ayer for any amount which it should be required to pay and Ayer likewise prayed for judgment over against Cox. Radebaugh filed a plea of privilege to be sued in Dallas county, the county of his residence. The plea of privilege was tried along with the main case and at the conclusion of the evidence, the plea was sustained and the suit as to Radebaugh was transferred to Dallas county. As to the other defendants, the case was submitted to the jury under special issues, and, in response thereto, the jury found, in substance, that one Joe Brown was an agent of Ayer for the sale of its products in Texas; that the nature of his agency was such as to make the employment of sub-agents necessary; that Radebaugh was Brown's subagent; and Ayer knew that he had been

so employed; that a contractual relation existed between Radebaugh and Ayer; that Radebaugh, acting in the course of his employment and as sub-agent for the sale of the goods of Ayer, negligently placed his sample cases in the aisle of Cox's store and thereby created an unsafe condition; that while Mrs. Kellog was using the aisle of the store as a customer, she struck her leg against one of said sample cases and was severely injured as a proximate result of such negligence; that Ayer, in the sale of its goods, negligently failed to warn salesmen engaged in the sale of its products against placing sample cases in the aisles of stores, which negligence proximately caused the injury complained of; that Cox designated the place where Radebaugh should exhibit his samples of goods; that the use of such place for such purpose was reasonably calculated to create a dangerous condition; that Cox was negligent in designating the place which it did so designate and such negligence was the proximate cause of plaintiff's injuries; that Cox negligently permitted Radebaugh to place his sample cases in the aisle; and such negligence was the proximate cause of the injury; that prior to the accident Cox did not have notice of the presence of said cases in the aisle; that Cox failed to exercise ordinary care to discover the cases in the aisle prior to the injury; that except for such failure said defendant would have discovered the cases in the aisle in time to have removed same prior to the accident; and that such failure was the proximate cause of Mrs. Kellog's injuries. The jury further found that the relation existing between Radebaugh and Ayer was not that of an independent contractor. The same finding was made as to the relation existing between Joe Brown and Ayer. The jury fixed the amount of plaintiff's damages at $9,800. Accordingly, a joint and several judgment was rendered in favor of Mrs. Kellog against Cox and Ayer, and a judgment was rendered in favor of Cox over against Ayer for a like amount. Both Cox and Ayer have appealed.

[1-3] Cox's first major contention is that the evidence was insufficient to show any negligence on its part, and, for that reason, the court should have instructed a verdict for it. It should be noted at the outset that Radebaugh was not an agent or employee of Cox and that if Cox is to be held liable at all, it is not because of Radebaugh's negligence in putting the cases in the aisle but because of Cox's failure to discover and remove them prior to the injury. The court submitted to the jury an issue as to whether, prior to the accident, Cox had notice of the cases in the aisle. The jury answered the issue in the negative. In connection with said issue, the court instructed the jury that by the term "notice" was meant "knowledge of such fact or facts as would put an ordinarily prudent person on inquiry, which inquiry, if followed with reasonable diligence, would lead to the discovery of the main fact, that is, the fact in question." We must presume therefore that Cox not only had no actual knowledge of the existence of the cases in the aisle but that said defendant did not have actual knowledge of any fact which would have put a reasonably prudent person on inquiry, but even though Cox had no such knowledge or notice, said defendant would be liable if the dangerous situation had existed long enough that a reasonably prudent person, in the exercise of ordinary care in looking after a store such as is here under consideration, would have discovered and removed the dangerous situation, for while a storekeeper is not an insurer of the safety of his customers while in his store, he is obligated to exercise ordinary care to keep the premises in a reasonably safe condition for their protection. 30 Tex. Jur. 871; 45 C.J. 837; Graham v. F. W. Woolworth Co., Tex.Civ.App., 277 S.W. 223; Texas-Louisiana Power Company v. Webster, 127 Tex. 126, 91 S.W.2d 302, 306; Bustillos v. Southwestern Portland Cement Company, Tex.Com.App., 211 S. W. 929. The mere finding that Cox had no knowledge of any fact which, if reasonably pursued, would have led to a discovery of the defective condition does not acquit said defendant of negligence in failing to exercise ordinary care to discover such facts. A storekeeper must exercise some care to see that his store is kept in a reasonably safe condition for his customers, even though he has no actual knowledge of any fact that would lead him to believe that a dangerous situation existed. Consequently, we must determine whether there was sufficient evidence to show that the sample cases had been in the aisle in such position as to create a dangerous situation long enough that, by the exercise of ordinary care, Cox should have discovered and removed same prior to the accident. The evidence shows that the aisle where the acci-

dent occurred was not a very wide one. Two people could walk down it abreast, but when someone was standing in the aisle, other customers had to pass down the aisle single file. In fact, Radebaugh testified that when he was standing in the aisle, stooping over the counter writing out his order, no one could get through the aisle unless he straightened up. There was a show case on the east side of the aisle and a table on the west side. Radebaugh went to the show case to exhibit his samples and secure an order for his goods. He was in the store somewhere between forty minutes and an hour. There is a dispute as to whether he had four or five sample cases. The witnesses described the cases as being from 7 to 10 inches wide. They were from 12 to 14 inches high. Radebaugh testified that he set some of the cases in the aisle, end to end, flat up against the panel of the table on the west side of the aisle and put the others on the show case and removed his samples therefrom. From time to time, after he finished with one case, he would replace the samples in it and place it in the aisle, flat against the table, and take up another one for the display of his samples. The sides of the table appear to have been boxed up approximately flush with the outside edge of the top of the table so that the cases could not be pushed back under the table. From this it appears that during the whole of the one hour period that Radebaugh was engaged in exhibiting his samples, some of the cases were in the aisle commonly used by the customers of the store. According to the testimony of Radebaugh, he had finished his work prior to the accident, and all of his cases were in the aisle. Mrs. Kellog and her sister, who was with her at the time of the accident, testified that immediately after the accident they looked back to see what had caused Mrs. Kellog to fall and that they saw two of the sample cases sitting in the aisle; that they were then turned out in the aisle at an angle; and that the one which Mrs. Kellog struck with her leg was about 14 inches high, 8 or 10 inches wide and 30 inches long. In view of the narrowness of the aisle and the width of the sample cases, we think the evidence was sufficient to justify the conclusion that the presence of the sample cases in the aisle created a dangerous situation and that such condition existed for the whole of the hour prior to the accident. It is true that the sample cases were being moved and replaced from time to time and that there was no evidence as to how long the particular sample case which Mrs. Kellog struck had been in the aisle, nor how long it had been sitting at an angle across the aisle, but we do not think this alters the case. Radebaugh had used the aisle continuously for an hour. There were at least two of the cases in the aisle at all times. The presence of any one of them created a dangerous situation. Consequently, if a representative of Cox had passed down the aisle at any time during the period in question, he would have discovered a dangerous situation. While the matter is not free from doubt, we have reached the conclusion that the jury was justified in concluding as it did that in view of the size of the store, the amount of trade carried on therein, and the frequency with which the aisle was used, together with all of the other circumstances in evidence, Cox did not exercise ordinary care to discover and remove the dangerous situation prior to Mrs. Kellog's injury. This assignment is overruled.

[4-7] Ayer contends that there was no such contractual relation existing between it and Radebaugh as to make it responsible for his negligence. The evidence shows, without dispute, that Radebaugh was working as an agent of one Joe Brown at the time of the accident in question. Brown testified that for many years prior to 1934, he was engaged in selling Ayer products on a commission basis; that he had the exclusive agency in Texas and several other southern states; that he sold the goods exclusively on a commission basis; that he was in nowise under the control or direction of Ayer as to how he carried on the business, except as to the terms of sale and prices to be received for the goods; and that otherwise it was left entirely to his discretion as to how he would carry on the business. In 1934, Brown became the vice-president and general sales manager of Ayer, but at that time, as an inducement to him to accept the management of the company, it was specifically agreed that he would be allowed to retain his southern territory, including the state of Texas, with the right to the exclusive agency for the sale of such products on a commission basis in said territory on the same terms and conditions as had previously existed; that said contractual relation continued up to and including the month of October, 1936, when

the accident in question occurred. He further testified that he owned no stock in the Ayer Company. Brown was corroborated in his testimony by Mrs. Lillian S. Dodge, president of Harriet Hubbard Ayer, Inc. Both Mrs. Dodge and Brown testified that the company furnished samples of goods to be used in making sales, supplied the blanks on which the orders were to be taken, and fixed the prices and terms at which the products were to be sold, but that otherwise the company exercised no control whatever over Brown and his employees in the carrying out of the contract in the territory allotted to Brown. Mrs. Dodge also testified that the contract was terminable at will and that the company would have discharged Brown if he had not produced a satisfactory business, but that the company did not undertake to exercise any control whatever over him and his employees as to how the contract should be carried out, except as above indicated. The above testimony was not materially contradicted in any respect. Both Brown and Radebaugh testified that Radebaugh was first employed by Brown in 1932 to sell Ayer products for Brown on a salary basis in the state of Texas; that said relation continued up to the time of the accident; that the company never paid Radebaugh any salary or commission; but his salary was paid exclusively by Brown as an individual, and that all orders taken by Radebaugh were first sent to Brown, and, after being checked by him, were sent to the company to be filled; that Ayer did not employ Radebaugh and did not undertake to exercise any control whatever over him in the carrying out of his contract with Brown.

We think this evidence was wholly insufficient to show such contractual relation between Radebaugh and Ayer as to make Ayer liable for his negligence. If Ayer is liable at all, it must be because of the doctrine of respondeat superior, growing out of the relation of master and servant. It appears without dispute that Radebaugh was not employed by Ayer but by Brown. We must therefore ascertain whether Brown was a servant of Ayer or an independent contractor. Restatement of the Law of Agency, ch. 1, par. 2, thus defines "master," "servant," and "independent contractor": "(1) A master is a principal who employs another to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service. (2) A servant is a person employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master. (3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." The above definitions are substantially in accord with those adopted and applied by the courts of this state. See Carter Publications v. Davis, Tex.Civ.App., 68 S.W.2d 640, 642, and authorities therein cited.

[8, 9] Under the rules above announced and the facts shown by this record, Brown was clearly an independent contractor and not a servant within the meaning of the law that makes the master liable for the negligence of the servant. Ayer did not exercise any control over the physical conduct of Brown or his employees in performance of the contract. The fact that Ayer's contract with Brown was terminable at will and that Ayer would have terminated it if Brown had not produced satisfactory results, and the further fact that Ayer fixed the prices and terms upon which the goods were to be sold, does not evidence such control over Brown as to render him a servant of Ayer. Such evidence merely shows that the employer was exercising control to see that the work was being performed and results accomplished according to the terms of the contract. As we understand, an employer has a right to exercise such control over an independent contractor as is necessary to secure performance of the contract according to its terms and to accomplish the results contemplated thereby without thereby creating the relationship of master and servant, so long as the employer does not destroy the employee's power of initiation nor undertake to control the employee in the means and manner of the performance of the work. See Carter Publications v. Davis, Tex.Civ. App., 68 S.W.2d 640, pars. 2, 3; 14 R.C.L. 68; 23 Tex.Jur. 547; Lone Star Gas Co. v. Kelly, Tex.Com.App., 46 S.W.2d 656; Davis v. General Acc. Fire & Life Assur. Corp., Tex.Civ.App., 127 S.W.2d 526, par. 6; Lehr, Inc., v. Brown, 127 Tex. 236, 91 S.W.2d 693, par. 1.

[10] It is true that at the time of the accident, Brown was the vice-president and sales manager of Ayer and that Radebaugh was employed by Brown and was under his

control; but he was the employee and under the control of Brown as an individual and not as vice-president and sales manager of Ayer. It was undisputed that before Brown became vice-president of Ayer, he was engaged as an independent contractor in the sale of Ayer's products in the state of Texas on a commission basis. At the time he became vice-president of the company, as an inducement to him to accept the position, it was agreed by all parties that he could continue to operate such commission business as his individual project, separate and apart from the company's business. We see no reason why such a contract should not be observed by the courts, where it is fairly entered into by all parties. Zorn v. Brooks, 125 Tex. 614, 83 S.W.2d 949. If Brown continued to operate the commission business as his own separate project, as he had a contractual right to do and as all the evidence shows that he did, then his employees in such commission business were not the servants of Ayer.

[11, 12] Cox's contention that Ayer, by its course of dealings, is estopped to deny that Radebaugh was its agent and representative cannot be sustained, because a person seeking to avail himself of the benefit of the doctrine of agency by estoppel must show that he has been induced to act to his prejudice on the implied representations of agency. 2 Tex.Jur. 424. No such showing was made in this case. We sustain the appellant Ayer's contention that the evidence is insufficient to show liability on its part.

[13, 14] Mrs. Kellog makes no complaint of the ruling of the court in sustaining the defendant Radebaugh's plea of privilege as to her suit, but Cox does complain of the sustaining of such plea as to the defendant Cox's cross-action. Cox sought judgment over against both Radebaugh and Ayer. The venue of such cross-action cannot be maintained in McLennan county under section 4 of Revised Statutes, art. 1995, Vernon's Ann.Civ.St. art. 1995, because neither of the defendants as to such cross-action resides in McLennan county. Cox asserts, however, that since it had the right to maintain its suit against Ayer, a foreign corporation, in McLennan county, it had a right to hold Radebaugh in the same suit as a necessary party defendant under section 29a of the same article. It has been held that when it is sought to maintain a suit against two or more defendants in the county of the residence of one of them under section 4, the plaintiff must prove a valid cause of action against the resident defendant. Stockyards National Bank v. Maples, 127 Tex. 633, 95 S.W.2d 1300; Caprito v. Weaver, Tex.Civ.App., 77 S.W.2d 595; Lipscomb v. Rankin, Tex.Civ.App., 139 S.W.2d 367. It would seem that the same rule should prevail in suits brought under section 29a—that is, that plaintiff should be required to prove a valid cause of action against the other defendant rightfully sued in the county where the suit was filed. As hereinbefore held, plaintiff failed to establish a valid case against Ayer and hence did not have the right to hold Radebaugh in the same suit on the ground that he was a necessary party. Radebaugh did not commit a trespass in McLennan county within the meaning of section 9 of Article 1995, and hence the venue could not be maintained in said county under said section. No reversible error is presented because of the sustaining of the plea of privilege.

It appears that the suits of the plaintiff against Harriet Hubbard Ayer, Inc., and the cross-action of R. E. Cox Dry Goods Company against the same defendant have been fully developed and that the evidence is insufficient to show any liability on the part of Harriet Hubbard Ayer, Inc. Consequently, the judgment in favor of the plaintiff against Harriet Hubbard Ayer, Inc., is set aside and judgment is here rendered that plaintiff take nothing against said defendant. Likewise, the judgment of R. E. Cox Dry Goods Company against the same defendant is reversed and judgment here rendered that said R. E. Cox Dry Goods Company take nothing as against said defendant on its cross-action. The judgment of the trial court is in all other respects affirmed.

*1257 127 L.R.R.M. (BNA) 2274, 108 Lab.Cas. P 10,274

Charles A. SAWYER, Plaintiff-Appellee,
v.
SWIFT & COMPANY, Defendant-Appellant.

No. 85-2801.
United States Court of Appeals,
Tenth Circuit.
Jan. 7, 1988.
Rehearing Denied March 15, 1988.

Former employee brought action against former employer arising out of discharge allegedly in connection with his naval reserve inactive training obligations. The United States District Court for the District of Kansas, Earl E. O'Connor, Chief Judge, 610 F.Supp. 38, entered judgment for former employee. Former employer appealed. The Court of Appeals, Barrett, Senior Circuit Judge, held that: (1) former employee's notice to employer that he would have to attend reserve drill first nonholiday weekend in following January was inadequate, and (2) even if former employee's reserve status played some role in his termination, there were sufficient other, nonpretextual, reasons for termination irrelevant to military status.

Reversed.

1. ARMED SERVICES k115(7)
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k115 Veterans Entitled
34k115(7) Leaving position for training or service.

C.A.10 (Kan.) 1988.

Employee who had obligations to perform armed forces reservist inactive duty training did not give employer adequate notice, as required by Veterans Reemployment Rights Act, that he would have to attend reserve drill on first nonholiday weekend in January and would not be available for assigned overtime duties; employee did not give specific date, employee later gave personnel manager a copy of his orders for another drill, those orders contained nothing pertaining to nonholiday weekend drill, and when overtime list was posted, employee failed to inform anyone that his name should not have been on the list. 38 U.S.C.A. Sec. 2024(d).

2. ARMED SERVICES k120
34 ----
34III Veterans' Benefits
34III(A) In General
34k113 Re-Employment
34k120 Discharge.

C.A.10 (Kan.) 1988.

Even if employee's naval reserve status played some role in his termination, there were sufficient other, nonpretextual, reasons irrelevant to his military status, and his termination did not violate Veterans Reemployment Rights Act; employee had a pattern of absenteeism and tardiness which started very shortly after his employment began. 38 U.S.C.A. Sec. 2024 (d).

*1258 William H. Berger, U.S. Dept. of Labor, Atlanta, Ga. (Benjamin L. Burgess, Jr., U.S. Atty.; Robert S. Streepy, Asst. U.S. Atty.; George R. Salem, Deputy Sol. of Labor; John F. Depenbrock, Associate Sol. of Labor, Washington, D.C.; Tedrick A. Housh, Jr., Regional Solicitor, U.S. Dept. of Labor, Kansas City, Mo., with him on the brief), for plaintiff-appellee.

Daniel B. Denk of McAnany, Van Cleave & Phillips, Kansas City, Kan., for defendant-appellant.

Before MOORE and BARRETT, Circuit Judges, and ANDERSON, (FN*) District Judge.

BARRETT, Senior Circuit Judge.

Swift & Company (Swift) appeals the Judgment and Order of the United States District Court for the District of Kansas, finding that Swift violated 38 U.S.C. Secs. 2021(b)(3) and 2024(d), the Veterans Reemployment Rights Act (Act), in its treatment of Charles A. Sawyer (Sawyer). Sawyer was an employee of Swift from December 8, 1980, until January 10, 1983, and a member of the Navy Reserves beginning for purposes of this case in October, 1982.

The District Court decided the case on the parties' joint motion for declaratory judgment based on stipulations of fact and deposition testimony. The court's Memorandum and Order appears at 610 F.Supp. 38 (D.Kan.1985). The stipulations considered by the trial court are as follows:

1. Defendant is a corporation maintaining a

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place of business at 4612 Speaker Road, Kansas City, Kansas.

2. Plaintiff was employed by defendant on December 8, 1980, in an other than temporary position as a mechanic and was discharged on January 10, 1983.

3. Plaintiff joined the Navy Reserve in October, 1982, a component of the Armed Forces of the United States, and was assigned to a Naval Reserve Unit in Memphis, Tennessee. The plaintiff would meet a military transport plane at Richards-Gebaur Airport at 6:00 p.m. on the Fridays preceding his drills for transportation to Memphis.

4. Plaintiff was scheduled to perform inactive duty training with his Naval Reserve Unit in Memphis, Tennessee on December 11 and 12, 1982.

5. Plaintiff attended a second step grievance hearing at Swift & Company on December 9, 1982. Also present at the hearing were Stan Hall, Lucille White, Henry Duron, Ron Lupardus, Steve Dickey, and Pat Holland. Plaintiff contends that at this hearing he gave defendant verbal notice of his make-up drill the first nonholiday weekend in January, 1983. Defendant alleges there was no such notice given.

6. The plaintiff did not work at Swift & Company on Saturday, December 11, 1982.

7. The plaintiff's supervisor at Swift & Company was Jerry Kaprol. Steve Dickey was employed in December, 1982, as Chief Engineer.

8. Plaintiff was a union steward for Local 122, National Brotherhood of Meat Packers and Industrial Workers.

9. Plaintiff rescheduled his make-up inactive duty training originally scheduled at Memphis for December 11 and 12, 1982, with the Naval Reserve Unit at Olathe, Kansas, for January 8 and 9, 1983.

10. The plaintiff's shift at Swift & Company was from approximately 2:00 *1259 p.m. to approximately 10:30 p.m. weekdays.

11. Defendant's objection to plaintiff's attending inactive duty training in Memphis was based on the fact that the plaintiff had to leave work early on Fridays preceding reserve drills.

12. On January 6, 1983, defendant posted a list of employees scheduled to work on Saturday, January 8, 1983. Plaintiff's name appeared on this list.

13. Plaintiff attended his make-up inactive duty training at the Naval Reserve Unit, Olathe, Kansas, on January 8 and 9, 1983, and did not report to his scheduled overtime work at Swift & Company on January 8, 1983.

14. Plaintiff attended inactive duty training at the Naval Reserve Unit in Memphis, Tennessee, in October and November, 1982.

15. There were eight mechanics on plaintiff's shift.

16. Every employee assigned to work on January 8, 1983, was a mechanic.

17. The plaintiff had been disciplined on occasions prior to January 10, 1983, for his work attendance record at Swift & Company and was accordingly in the progressive disciplinary mode.

18. The plaintiff was scheduled to work on January 8, 1983, and he did not report for work on such date.

19. The plaintiff returned to work on January 10, 1983, and he was indefinitely suspended, and subsequently discharged by defendant.

The issues thus presented for the trial court's determination were: (1) the responsibility of Swift to allow Sawyer a monthly absence from work on Friday evenings in order to travel from Kansas City to Memphis, Tennessee, for his weekend training drills; (2) whether Sawyer gave Swift adequate notice that he would attend a makeup drill in Olathe, Kansas, on January 8-9, 1983, in lieu of assigned overtime that weekend; and (3) whether Sawyer was terminated as a result of his attending military reserve training on January 8-9, 1983.

The trial court found with respect to the first issue that because 38 U.S.C. Sec. 2024(d) provides that a leave of absence from work "shall upon request be granted ... for the period required to perform ...

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inactive duty training," Swift was obligated to allow Sawyer to leave early on Fridays to attend training drills. Swift apparently does not dispute this finding. With respect to the other two issues, the trial court found that Sawyer gave adequate notice during the December 9, 1982, second-step grievance hearing that he would be absent the "first nonholiday weekend in January, 1983" for a make-up drill in Olathe, Kansas and that Sawyer was terminated in violation of 38 U.S.C. Sec. 2021(b)(3) (FN1) as a direct result of attending that drill. The court ordered reinstatement and back pay and ruled that the back pay could not be reduced by the unemployment compensation Sawyer collected after he was fired. Swift has appealed these three determinations.

DISCUSSION

Our standard of review is set forth in Fed.R.Civ.P. 52(a): "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." This standard may be problematic when the trial court bases its findings of fact upon deposition testimony and stipulations by the parties. Nevertheless, the clearly erroneous standard applies to all cases where the trial court makes findings of fact. Anderson v. City of Bessemer City, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Anderson summarizes certain general principles that may be gleaned from the cases. The foremost of these is that "[a] finding is clearly erroneous 'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has *1260 been committed.' " Id. at 573, 105 S.Ct. at 1511. On the other hand, the reviewing court may not reverse the trier of fact merely because it might have decided the case differently, nor can it decide factual issues de novo. Id. Finally, where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. Id. at 574, 105 S.Ct. at 1512. Bearing these standards in mind, we will discuss each issue raised by Swift.

I.

The trial court's determination that Sawyer gave adequate notice of his intention to make up his December training drill during the weekend of January 8-9, 1983, is a conclusion of law based on a factual finding that Sawyer did bring the matter up at a second step grievance hearing on December 9, 1982. We do not question the trial court's factual finding, since the evidence was in conflict on this point and the trial court must choose the more credible version. Still, on the basis of the entire record, we do question the court's conclusion.

First, we observe that legal authority on the subject of what constitutes proper notice to an employer under 38 U.S.C. Sec. 2024(d) (FN2) is sparse. In Blackmon v. Observer Trans. Co., 102 C.C.H. Labor Cases p 11, 450 at 23, 913 (W.D.N.C.1982) [Available on WESTLAW, 1982 WL 805], the court was asked to decide whether mention of a reserve obligation by a driver at a drivers' meeting convened for general purposes constituted proper notice under the Act. The court sidestepped the issue by finding that because no one could corroborate the employee's contention, the employee had not in fact made the request. We can find no other cases that squarely address such an issue .

[1] In the instant case, we accept the trial court's finding that during a grievance hearing in December, Sawyer brought up the fact that he needed to make up his reserve obligation on "the first nonholiday weekend in January." We also note that the primary purpose of the grievance proceeding was to consider two grievances filed by Sawyer: the first because he was not scheduled to work overtime on a Friday holiday in November, and the second because he was disciplined for not wearing a beard net. We also note that no witness remembered Sawyer giving a specific date. Further, the record shows that later in December, Sawyer gave Patrick Holland, the personnel manager, a copy of his orders for a January 22 drill. The orders contained nothing pertaining to the January 8 drill, nor did Sawyer mention it (R., Vol. VII, pp. 28-30). Finally, when the overtime list was posted on January 6, the evidence is undisputed that Sawyer failed to inform anyone that his name should not have been on the list and that he would not be working on January 8. The trial court excused this, saying it was not unreasonable for Sawyer to fail to remind Swift that he needed the weekend off, in light of the fact that Swift had denied Sawyer time off in December to fly to Memphis. This misses the mark, since the makeup drill was in Olathe and did not necessitate travel time on Friday night. Moreover, several Swift witnesses testified without contradiction that they told Sawyer that Reserve drills on Saturdays and Sundays were no problem. Looking at the record as a whole, it is clear to us that although Sawyer did mention a makeup drill to take place the

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first nonholiday weekend in January, later events proved this statement ineffective as notice to Swift. Sawyer's reserve status did not eclipse his ordinary obligations to his employer, including his obligation to *1261 notify or remind Swift, at any time from January 6 up to one hour before his shift was to begin on January 8, that he had a prior commitment. On this record, notice was clearly inadequate: it was not understood and acted upon, and Sawyer knew or should have known it. Had Sawyer not been in the Reserves and had the same situation occurred, Swift would have been justified in terminating Sawyer. His record was replete with unexcused absences and tardiness, and it is undisputed that he was one infraction away from termination.

We hold that under the circumstances of this case, the trial court's conclusion that notice was adequate was clearly erroneous.

II.

The trial court's finding that Sawyer was terminated in violation of 38 U.S.C. Sec. 2021(b)(3) is premised on its conclusion that he gave adequate notice of his January 8 drill obligation. Because he was fired after attending this drill, the court found the conclusion inescapable that Sawyer was terminated because of his reserve status. The trial court did not discuss the role of Monroe v. Standard Oil Co., 452 U.S. 549, 101 S.Ct. 2510, 69 L.Ed.2d 226 (1981), except to dismiss it as inapplicable to the issue, not under appeal here, of whether Swift was required to give Sawyer travel time on Friday evenings.

In our view, Monroe cannot be ignored, despite its factual dissimilarity to the instant case. The issue in Monroe was whether an employer was required to make scheduling accommodations for employee-reservists. The Court held an employer did not have to make such accommodations because Sec. 2021(b)(3) was intended and enacted for the limited purpose of protecting reservists from discrimination based solely on their reserve status. If scheduling accommodations would not be made for employees without military obligations, they would not be made for employee-reservists. Monroe 's importance to the instant case is two-fold.

First, it requires an analysis in terms of an employer's treatment of non-reserve employees. If a non-reserve employee in Sawyer's position would be terminated for the same conduct, Sawyer's reserve status cannot insulate him. If, on the other hand, a non-reserve employee would not be terminated for the same conduct, it becomes obvious that the reasons given for termination were pretextual. The evidence showed that other employees had been disciplined or terminated for missing scheduled overtime on Saturdays. (R., Vol. VII, pp. 40-42). Sawyer was in the "progressive mode" of the disciplinary progression, which meant that one more infraction on his part would result in termination. (R., Vol. VII, pp. 55-57). Moreover, there were a number of other reservists at Swift who were given time off with no problems. (R., Vol. VIII, p. 27). On this basis, it would be difficult to conclude that Sawyer was discriminated against because of his reserve status.

The second way Monroe is significant is that it suggests a much more stringent standard for cases brought under Sec. 2021(b)(3) than for those brought under other federal labor statutes, which apparently require a "but-for" test. At 452 U.S. 559, 101 S.Ct. at 2516, the Court states:

> The legislative history thus indicates that Sec. 2021(b)(3) was enacted with a significant but limited purpose of protecting the employee-reservist against discriminations like discharge and demotion, motivated solely by reserve status (emphasis supplied).

Again at 559-60, 101 S.Ct. at 2516-17:

> Congress wished to provide protection to reservists comparable to that already protecting the regular veteran from 'discharge without cause' --to insure that employers would not penalize or rid themselves of returning reservists after a mere pro forma compliance with Sec. 2024(d) (emphasis supplied).

And yet again at 565, 101 S.Ct. at 2519:

> The frequent absences from work of an employee-reservist may affect productivity and cause considerable inconvenience to an employer who must find alternative means to get necessary work done. Yet Congress has provided in Sec. 2021(b)(3) *1262. that employers may not rid themselves of such inconveniences and productivity losses by discharging or otherwise disadvantaging employee-reservists solely because of their military obligations (emphasis supplied).

In Clayton v. Blachowske Truck Lines, 640 F.Supp. 172 (D.Minn.1986), the court applied the

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standard set forth in Monroe to a situation similar to the case at bar. Plaintiff was the safety director for a trucking firm whose duties included working on Saturdays. He informed his employers before accepting the position that he had Minnesota National Guard drills one weekend a month and was assured there would be no problem. After approximately four months, plaintiff was terminated for poor job performance. Among the specific reasons were plaintiff's frequent absences on Saturdays. Plaintiff asserted that this reason implicated his National Guard status, thereby violating Sec. 2021, and that it was a material issue of fact whether the other reasons were pretextual and thus precluded summary judgment. Citing Monroe, the court held:

> Even when viewed in a light most favorable to plaintiff the record before the court shows that plaintiff was not terminated solely because of his reserve status. It is undisputed that defendants knew when they hired plaintiff that he was in the National Guard and that they assured plaintiff that these obligations would be no problem. It is also undisputed that plaintiff was given several reasons for his termination. Three of the four reasons ... were unrelated to his guard duties and are supported by the evidence. Moreover, defendants have pointed to additional reasons for termination which are well supported by the sworn statements of a number of witnesses.... For these reasons, the court concludes as a matter of law that plaintiff was not terminated solely because of his National Guard obligations. 640 F.Supp. at 174.

On appeal, the the trial court was affirmed in Clayton v. Blachowske Truck Lines, 815 F.2d 1203 (8th Cir.1987). We can find no other circuit court cases construing 38 U.S.C. Sec. 2021(b)(3) and the language in Monroe within a similar factual context. In our view, the language in Monroe is plain and must be construed as in Clayton.

[2] In the instant case, as in Clayton v. Blachowske Truck Lines, id., it is clear that even if Sawyer's reserve status played some role in his termination, there were sufficient other, non-pretextual, reasons irrelevant to his military status. Sawyer's disciplinary problems antedated his joining the Reserves by nearly two years. In fact, his pattern of absenteeism started very shortly after his employment at Swift began. And the witnesses were unanimous in saying that Swift would not have terminated Sawyer if management had known in advance that Sawyer would not be working on January 8. We cannot conclude as a matter of law that Sawyer was terminated solely because of attending Naval Reserve training on January 8, 1983. Rather, we conclude that Sawyer was terminated for valid reasons of absenteeism and tardiness, having little, if anything, to do with his Reserve obligations.

Having reached this conclusion, we need not consider the issue of whether Sawyer's back pay award should be reduced by the amount of his employment compensation.

For the above reasons, we hold the trial court's conclusions as to the issues discussed herein are clearly erroneous and we must REVERSE.

FN* The Honorable Aldon J. Anderson, Senior United States District Judge for the District of Utah, sitting by designation.

FN1. 38 U.S.C. Sec. 2021(b)(3) provides:

> Any person who [is in the employ of a private employer] shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

FN2. 28 U.S.C. Sec. 2024(d) provides:

> Any employee [in private employment] shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States.

The phrase "upon request" has been interpreted to mean "after proper notice." Rodgers v. Missouri Pacific R. Co., 82 C.C.H. Labor Cases p 10, 222 at 16, 859 (E.D.Ill.1977) [Available on WESTLAW, 1977 WL 1736]; Blackmon v. Observer Trans Co., 102 C.C.H. Labor Cases p 11, 450 at 23, 913 (W.D.N.C.1982) [Available on WESTLAW, 1982 WL 805].

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